Supreme Court, U.S.
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In The

Supreme Court of the United States

THORNBURY NOBLE, LTD.,

Petitioner,

v.

THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the Members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 183

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QUESTION PRESENTED FOR REVIEW

Egregious abuse of power at any level of government ought to shock the judicial conscience in a constitutional sense. Where such abuse involves intentional and callous disregard of the law, it ought to impel the Federal Courts to afford relief to an injured and innocent citizen. The Circuit Courts have stated an "essential purpose" of the "shocks the conscience" standard that results in an approach to review that is inconsistent with the approach taken by this Court in the land use arena. As a consequence, the Circuit Courts are deciding an important question of law, *i.e.*, how the "shocks the conscience" standard should operate in the land use setting. That question has not been, but ought to be, settled by this Court. The question presented for review is:

Whether actions taken by elected municipal officials that include knowing violations of state law and are intended to deprive one applicant of its property rights in order to favor another applicant for land use approvals constitute an abuse of official power that "shocks the conscience" in a constitutional sense.

CORPORATE DISCLOSURE STATEMENT

Thornbury Noble, Ltd. is a Pennsylvania limited partnership. The general partner of Thornbury Noble, Ltd. is TN Associates, LLC, a closely held Pennsylvania limited liability company. There are no subsidiaries or affiliates of Thornbury Noble, Ltd., or its general partner, that have issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	19
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Carlino v. Whitpain Investors, 453 A.2d 1385 (Pa. 1982) 14

Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992) 13

City of Cuyahoga Falls, Ohio, et al. v. Buckeye Community Hope Foundation, et al., 538 U.S. 188 (2003) 7, 8, 18

Collins v. Harker Heights, 503 U.S. 115 (1992) 8

Corneal v. Jackson Township, 94 Fed.Appx. 76 (3rd Cir. 2004) 9

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 7, 10, 11, 12, 18

Dolan v. City of Tigard, 512 U.S. 374 (1994) 12, 18

Eichenlaub v. Township of Indiana, et al., 385 F.3d 274 (3rd Cir. 2004) 9

Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743 (3rd Cir. 1982) 10

In Re: Appeal of Realen Valley Forge Greenes Associates, 838 A.2d 718, 728 (Pa. 2003) 10

Lindquist v. Buckingham Township, 106 Fed.Appx. 768 (3rd Cir. 2004) 9

Nollan et ux. v. California Coastal Commission, 483 U.S. 825 (1987) 8, 12, 18

Trojnacki v. Board of Supervisors of Solebury Township, 842 A.2d 503 (Pa. Commw. 2004) 15

United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3rd Cir. 2003) 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1254 1

28 U.S.C. §1331 ..... 1, 7

28 U.S.C. §1343(a)(3) 1, 7

42 U.S.C. §1983 7

53 P.S. §10101 ..... 3, 5

53 P.S. §10501 3

53 P.S. §10503 3

53 P.S. §10503-A 3

53 P.S. §10603 ..... 3, 10

53 P.S. §10603(c)(2) 6

53 P.S. §10603.1 3

53 P.S. §65101 4

OTHER AUTHORITIES

Analysis of Revisions to the Pennsylvania Municipalities Planning Code, Local Government Commission of the General Assembly of the Commonwealth of Pennsylvania (January 1989) 3, 15

Supreme Court Rule 10(c) 1

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thornbury Noble, Ltd., the Petitioner, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The September 20, 2000 opinion and order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced at App. 9-18. The November 9, 2000 order of that Court is unreported and is reproduced at App. 19-20. The March 20, 2002 opinion and order of that Court is unreported and is reproduced at App. 21-63. The October 21, 2003 opinion and order of that Court is unreported and is reproduced at App. 64-80. The September 28, 2004 opinion and order of the United States Court of Appeals for the Third Circuit is unreported, but cited at 112 Fed.Appx. 185 (2004) and is reproduced at App. 1-8 The November 19, 2004 order denying rehearing en banc is reproduced at App. 81-82.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on September 28, 2004. The order denying rehearing en banc was entered on November 19, 2004. The jurisdiction of the Third Circuit was invoked pursuant to 28 U.S.C. §§1331 and 1343(a)(3). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Supreme Court Rule 10(c) in that this matter

involves an important question of federal law that has not been, but should be, decided by this Court.

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 1983 of 42 United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

Pertinent provisions of Pennsylvania law include sections of the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101, *et seq.*, as set forth in the Appendix and as follows: 53 P.S. §10501; §10503; §10503-A; §10603; and §10603.1. App. 83-98. Petitioner also relies on the *Analysis of Revisions to the Pennsylvania Municipalities Planning Code*, issued by the Local Government Commission of the General Assembly of the Commonwealth of Pennsylvania, January 1989. App. 99-104.

STATEMENT OF THE CASE

That this case involves an abuse of power by a municipal government cannot be denied. Nor will it be argued that every abuse of power by a municipal government constitutes an infringement on the constitutional rights of persons appearing before it. Where, however, the conduct that constitutes the abuse of power includes knowing violations of state law, and the blatant favoring of one citizen over another, that conduct must "shock the conscience" in a constitutional sense.

The instant matter is based on a complaint filed in the United States District Court for the Eastern District of Pennsylvania that alleges a denial of due process and equal protection in the consideration of an application for local land use approvals by a Pennsylvania municipality.

What is Sought

Petitioner seeks to have this Honorable Court state how the "shocks the conscience" standard of review should operate in the arena of local land use decisions. The Circuit Courts to date have invoked the standard to avoid judicial review of local government decisions rather than applying it to analyze the conduct at issue. This opens the door for unparalleled local government abuse of power that cannot be reconciled with the constitutional rights of the citizens of this country. The definition of how the "shocks the conscience" standard will be applied in the context of a land use application should be enunciated by this Court to provide a consistent framework for analysis by the Circuit Courts of Appeal and to settle this important question of federal law.

Facts Material to the Question Presented

Thornbury Township [hereinafter "the Township"] is a township of the second class located in Chester County, Pennsylvania, and duly organized and existing pursuant to the Pennsylvania Second Class Township Code, 53 P.S. §65101, *et seq*. It has enacted a zoning ordinance and subdivision and land development ordinance pursuant to enabling legislation known as the Pennsylvania Municipalities Planning Code [hereinafter "the MPC"], 53 P.S. §10101, *et seq*. The Township is governed by a five person Board of Supervisors, whose members are elected officials.

Petitioner, Thornbury Noble, Ltd. [hereinafter "Noble"], is the owner of real property in Thornbury Township. In 1993, Noble secured local land use approvals to build an L-shaped retail building on its property. App. 159-161. In November of 1997, Noble had an opportunity to bring a

supermarket to its property, which was a permitted use under the zoning ordinance. App. 119.

In order to provide the optimal traffic circulation plan on the property, a rezoning of approximately two (2) acres of residential property owned by Noble adjacent to its commercially zoned lands was needed. App. 188-189; 315-16. A supermarket could, even without the rezoning, be built on the property with a less favorable, but still acceptable, traffic circulation layout. App. 188; 326-27 and plans at App. 421-23. To secure the necessary Township approvals for the supermarket, Noble filed an application seeking alternative relief from the Township: either (i) a rezoning of the two (2) acres; or (ii) an amendment of the previously approved final land development plan. App. 245-47. The only difference between the plans is the layout and arrangement of parking and access. App. 245 and plans at App. 421-23.

At the same time that Noble was seeking approvals, a competitor, R.J. Waters & Associates [hereinafter "Waters"] was seeking a rezoning to permit its land in the Township to be developed as a shopping center, including a supermarket. App. 337-38. The Waters property is located in proximity to Noble's land.

It was commonly believed that only one additional supermarket would be built in the Township so that Noble and Waters were direct competitors for the supermarket. App. 420. It was also commonly accepted that the victor would be the landowner who could deliver the required permits and approvals faster. App. 399-400.

At first, the Waters application met with little favor from the Township while the Noble proposal was deemed "realistic and achievable". App. 315-16; 337; 343; 348; 355-56. As the parallel processes unwound, however, Waters

secured a decided advantage by offering to pay $600,000.00 to the Township for acquisition of open space. Noble was unaware of the offer, or that a "deal" had been struck. App. 363-64.

The "deal" with Waters was to be implemented by an amendment to the Zoning Ordinance that would rezone the Waters property and provide that shopping centers would be permitted by conditional use.[1] Since it was anticipated that only one supermarket would be built, the Township now had a vested interest in seeing that the Waters application secured its approvals before Noble's application. It also had the power to make that happen. One of the Supervisors stated the goal in writing. App. 399-400.

Noble, unaware of the deal, began to meet with opposition and delay in pursuing its goals. App. 214-17; 275-76. This only increased when Noble itself was asked for a monetary contribution for open space preservation and stated one would be made if required by statute. App. 217. There was no statute requiring such a payment.

The Township went on to adopt the rezoning for Waters and to condition its approval of the shopping center on the illegal donation. App. 371-95. Noble, however, after having been denied the rezoning of the two (2) acres, had persisted in its attempts to secure the amended land development plan approval to which it was entitled. App. 234-44; 280-81. In order to fully and finally frustrate

[1] A conditional use is a use permitted subject to a hearing process as a result of which the governing body may impose conditions on the use. 53 P.S. §10603(c)(2). It was no doubt chosen as the vehicle for the Waters application so that the Board could condition the approval upon payment of the $600,000.00 "voluntary" contribution.

Noble's efforts, the Township took the position that Noble's amended land development plan application required conditional use approval and invoked the very statute that it had enacted to facilitate the Waters deal. App. 282-83.

At that point, Noble knew that it could never catch up to the Waters application. The conduct of the Township had succeeded in preventing Noble from securing the approvals to which it was entitled. App. 326-27. Noble was forced to abandon its plans for a supermarket and to build an L-shaped shopping center on its land, which is a much less valuable use of the property.

As Noble proceeded with the L-shaped center, it became aware of the Township's actions and filed its complaint in the United States District Court for the Eastern District of Pennsylvania, which had jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3) because Noble alleged that the actions of the defendants violated its Fourteenth Amendment rights and stated a cause of action under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

The Important Federal Question

The parameters of the "shocks the conscience" standard in the land use context presents an important question of federal law that ought to be decided by this Court.

Protection against governmental arbitrariness is the core of due process. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). This includes the right of a landowner/developer to be free from intentionally irrational and arbitrary zoning actions. *City of Cuyahoga Falls, Ohio, et al. v. Buckeye Community Hope Foundation*, 538 U.S. 188

(2003). Just as this Court entered the land use arena to decide *Nollan et ux. v. California Coastal Commission*, 483 U.S. 825 (1987)[2], it should now enter that arena to provide a cogent definitional analysis of the "shocks the conscience" standard.

The Recent Land Use Decisions

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court applied the "shocks the conscience" standard in a matter involving a high speed chase that resulted in the death of a passenger on the motorcycle being pursued. There, this Court stated that: "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" citing *Collins v. Harker Heights*, 503 U.S. 115 (1992). *Id.* at 846.

In *City of Cuyahoga Falls*, this Court cited to *County of Sacramento* in holding that the conduct of the public official involved was not egregious or arbitrary government action. *Id.* at 198. The Court did not engage in any discussion of the standard since the conduct complained of there was clearly not egregious.[3]

In *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003), the Third Circuit abrogated the "improper motive" standard that had been applied in land use cases and held that the "shocks the conscience" standard applies. Beyond calling the "improper

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[2] Whether an access condition on a development permit was sufficiently related to burdens created by the project to pass constitutional muster. *Id.* at p. 830.

[3] City engineer's refusal to issue a permit constituted a nondiscretionary, ministerial act consistent with the City Charter. *Id.* at 198.

motive" standard a "much less demanding test" [*Id.* at 400], the Circuit Court provided little analysis of how the "shocks the conscience" standard would operate in a land use context.

The Court concluded that the "shocks the conscience" standard is more demanding than the "improper motive" standard because "[t]he term 'improper' sweeps much more broadly, and neither Belo nor the cases that it spawned ever suggested that conduct could be 'improper' only if it shocks the conscience." *United Artists*, *supra.* at 400. Without guidance from this Court, the Circuits have begun to dismiss challenges as a matter of law where an improper motive has been demonstrated, such as in the instant matter. The leap from "improper motive" to the current posture where motive is not deemed relevant is too extreme. A balanced analysis where motive is one of the elements considered is much more in keeping with this Court's approach to constitutional analysis of governmental conduct.

After *United Artists*, the Third Circuit has routinely dismissed land use matters as not meeting the "shocks the conscience" standard as a matter of law. *See Eichenlaub v. Township of Indiana, et al.*, 385 F.3d 274 (3rd Cir. 2004); *Corneal v. Jackson Township*, 94 Fed.Appx. 76 (3rd Cir. 2004); *Lindquist v. Buckingham Township*, 106 Fed.Appx. 768 (3rd Cir. 2004). In *Eichenlaub*, the Court noted that the "shocks the conscience" test is clearly designed to avoid converting federal courts into super zoning tribunals. *Id.* at 285. This does not state a proper purpose of the "shocks the conscience" standard, however, because the standard itself was not enunciated in a land use context. The purpose of the standard is to determine when official action rises to the level of a violation of due process.

The Third Circuit has, therefore, altered the purpose of the "shocks the conscience" standard and now applies it in a land use context using a different barometer than the test itself requires. Once the goal becomes avoiding judicial review so as not to become a "super" zoning appeals board, the analysis of the "shocks the conscience" standard deprives landowners of meaningful federal remedies in light of egregious local government abuses.

Rather than substituting a goal of avoiding judicial review, the Circuit Courts should return to the definitional context of *County of Sacramento* itself and apply the standard as it is defined therein with appropriate analysis for the land use context. As this Court stated in *County of Sacramento*: "Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . ". *Id.* at 850.

The Land Use Context

The MPC governs land use law in Pennsylvania. *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982).

The MPC contemplates that a municipality will engage in comprehensive planning to form the basis of its land use ordinances. 53 P.S. §10603. App. 94-97. If implemented, the MPC provides for land use regulation based on sound land planning and not on the vagaries of a constantly changing political landscape.

The Supreme Court of Pennsylvania recently reiterated that the limit beyond which the power to zone in the public interest may not transcend is the protected property rights of individual landowners. *In Re: Appeal of*

Realen Valley Forge Greenes Associates, 838 A.2d 718, 728 (Pa. 2003).

It is in this context that the federal courts should conduct an analysis of whether actions of municipal officials in the land use setting "shock the conscience."

Abusive Governmental Action

In *County of Sacramento, supra.*, this Court describes the kind of official action that would "shock the conscience" as follows:

"Exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 846.

"Government power arbitrarily and oppressively exercised." *Id.*

"The most egregious official conduct." *Id.*

"The Due Process Clause was intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'" *Id.* [citations omitted].

The "shocks the conscience" standard is not a "one size fits all" analysis. The particular circumstances of each case affect the outcome of application of the standard. Conduct that is merely negligent will fall below the threshold of constitutional due process, but conduct intended to injure in some way not justified by any government interest is the sort of official action that is "most likely" to rise to the conscience-shocking level. *County of Sacramento, supra.* at 849.

In a land use context, unlike the high-speed chase scenario of *County of Sacramento*, the governing body of the municipality takes official action with deliberation. It does not make decisions under duress. The governing body engages in an intentional process and almost invariably with access to legal counsel, as well as other advisors such as civil engineers and land planners. It is difficult to imagine a "negligent" land use determination.

In a land use context, rules govern official action. In Pennsylvania, state law dictates the parameters of the official action. Zoning must be based upon planning; exactions of contributions from landowners must be in compliance with the MPC to be legal. The power to zone and regulate land use, as with all government power, must be wielded fairly and impartially and it must be wielded in compliance with the law.

In the land use context, therefore, the "shocks the conscience" standard should apply not just to the outcome of the state process, but to the means employed. Even an otherwise justified purpose can be accomplished in a manner that "shocks the conscience" in a constitutional sense.

In *Nollan*, *supra*, the goal of the permit condition to preserve public access to beaches was not nefarious in any way. The method used to achieve the goal, however, ran afoul of the constitutional protections afforded landowners because the condition imposed placed an undue burden on the applicant that was so disproportionate to the benefit conferred as to constitute a taking without just compensation.

Nollan and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provide an appropriate approach to the constitutional protections afforded landowners in the land use

context that is missing from the application of the "shocks the conscience" standard by the Circuit Courts in the land use arena. The analysis of land use actions by the Third Circuit, and the Eighth Circuit in *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992), do not approach the standard in the proper manner and, thus, have paved the way for rampant local government abuse of power.

What Happened Here

Thornbury Township and its Board of Supervisors abused their power in a most egregious way to deprive Noble of its property rights. The facts in this matter provide an opportunity for this Court to place the "shocks the conscience" standard in the proper perspective in the land use context.

The Township's Conduct

The Township engaged in a course of conduct in this matter that includes at least two instances of deliberate violations of the law of the Commonwealth of Pennsylvania: the selling of zoning to Waters; and the extraction of an illegal impact fee from Waters and the attempted extraction of such a fee from Noble. The totality of these actions, their motive and character, rise to the level of an egregious abuse of official power that meets the "shocks the conscience" standard. Noble was harmed by the actions of the Township, which were taken to favor Waters, a direct competitor to Noble. Because the Township's conduct that harmed Noble was taken with regard to an application by another landowner, Noble has no state remedy to redress that harm.

Waters wanted a rezoning; the application went badly. App. 337, 343, 348, 355-56. The Board made it clear to Waters, however, that it could obtain a rezoning, but only for a price. Such a "sale" of zoning violates Pennsylvania law. *Carlino v. Whitpain Investors*, 453 A.2d 1385 (Pa. 1982). (The power to zone cannot be surrendered or curtailed by bargain or its exercise controlled by considerations that enter into the law of contracts. *Id.* at 1388.) The allegations of Noble's complaint and the record in this matter establish that the rezoning of the Waters piece was blatantly given in return for the $600,000.00 payment, *i.e.*, Waters received its zoning approvals as a *quid pro quo* for the payment of $600,000.00. Had the payment been "voluntary," it would not have become a condition of Waters' approval. Had Waters not seen the payment as a *quid pro quo* for its zoning, it would have made the payment prior to the rezoning.

After Waters agreed to make the illegal payment, the Township asked Noble to do likewise. Noble refused. After that refusal, the Board systematically denied every request Noble made. The Township refused to approve the proposals of Noble for two reasons: 1) because Noble refused to comply with an illegal request for an unauthorized payment; and 2) to protect the payment of $600,000.00 from Waters, which payment would not be made if Waters did not win the race to secure approvals first.

The exaction of an illegal impact fee from Waters and the attempted exaction of an illegal impact fee from Noble violate Section 503 of the MPC. Preservation of open space is a legitimate municipal goal, but the manner in which the Township secured the payment from Waters, and attempted to secure payment from Noble, violates the law.

Section 503(11) was added to the MPC in 1988. In the *Analysis of Revisions to the Pennsylvania Municipalities Planning Code* issued by the Local Government Commission, the addition was explained as follows:

> The provisions of this clause are intended to avoid arbitrary and abusive application of such requirements [that new development contribute to traffic improvements, open space, etc.] by establishing basic 'ground rules' which are intended to limit municipal discretion.

App. 103.

A municipality cannot extract a fee to preserve open space except in compliance with Section 503.[4] Thornbury Township did not comply with Section 503 in extracting money from Waters and attempting to extract money from Noble.

There is no doubt that the Township deliberately favored Waters over Noble; the chairman of the Board of Supervisors put it in writing. In a memorandum dated March 24, 1998, he stated:

> One key issue is not having this[5] slow down the Waters' project since we want them to be able to lay the first brick to assure their supermarket will be the next one built to enable our funding

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[4] Seeking payment on account of recreation fees is an "impact fee" covered by Article V-A of the MPC. *Trojnacki v. Board of Supervisors of Solebury Township*, 842 A.2d 503 (Pa. Commw. 2004).

[5] A neighbor of the Waters' property had raised certain issues and concerns with the plan. App. 371-95, finding No. 13.

> for the next phase of the Dallet tract acquisition effort.

App. 400. He goes on to say that Noble was to be deprived of the approvals it sought, but no one advised Noble of that decision. App. 400. The memorandum described here was written **before** Noble had even submitted its formal application.[6] The Township watched as Noble expended time, effort, and money to achieve its valid land use goals knowing all along that it would not permit Noble to have the supermarket that the Township had decided would be given to Waters in return for an illegal payment.

In addition, another Supervisor interfered with Noble's agreement with Genuardi's supermarket. App. 209-10. Genuardi's had a letter of intent with Noble. Supervisor MacDonnell called the director of real estate for Genuardi's and told him that Noble would not get its approvals and told him to look into the Waters' property as an alternative location. App. 209-10.

The Township rushed to deny Noble's application; it did not wait for the Chester County Planning Commission review, which proved favorable to Noble. App. 409-11. It denied the application for rezoning on November 3, 1998, the same evening it approved Waters' rezoning and conditional use. App. 275-76. The Township had not yet acted, however, on the alternative request for an amended land development plan without the rezoning. App. 280-81.

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[6] Noble had been in informal discussions with the Township and had appeared at meetings of the Board of Supervisors to discuss its goal to bring a supermarket to its property. The formal application was submitted in October of 1998. App. 245.

The rezoning for Waters had little to do with sound principles of land use planning, as evidenced by the recommendation of the Chester County Planning Commission that the application be denied. App. 412-18. That recommendation was based on the conclusion that the proposal was inconsistent with the Township's land use policies and because of significant impacts on the road network. App. 412-18. Waters, however, had agreed to "pay good money" for its approvals and would have them regardless of merit.

After the November 3 meeting, Noble lost its deal with Genuardi's, but had the opportunity to secure SuperFresh as a tenant. App. 326. When Noble asked to have that application for an amended final plan placed on the Board's agenda for a decision, the Township, during a regularly scheduled meeting not attended by Noble, which had no reason to believe its application would be discussed, or by the Township solicitor, decided that Noble required conditional use approval to secure an amended final plan. App. 296. The minutes make it clear that the Township knew exactly what it was doing; the conditional use process would delay Noble and prevent it from securing a supermarket as a tenant. App. 296.

The Township's blatant abuse of power had achieved its end. It forced Noble to abandon its plans to build a supermarket. Instead, Waters built a supermarket and the Township received an illegal payment.

Noble had no remedy under state law to challenge the effect of the illegal agreement with Waters. The actions of the Township caused delay, as it knew they would, to allow Noble's competitor to secure an advantage over Noble. There would only be one supermarket built; the Township

made sure that Waters, not Noble, would build that supermarket. Noble has no redress in the state courts.

The Township knowingly violated the law in order to secure and retain an illicit payment of money from Waters and, to protect that ill-gotten gain, it trampled upon Noble's rights as a land use applicant.

The right to substantive due process is violated in a land use case where a municipality engages in egregious or arbitrary conduct. *City of Cuyahoga Falls*, *supra*. In determining whether conduct is egregious to the degree that it "shocks the conscience," the court should consider whether the conduct was intended to injure in some way unjustifiable by any governmental interest. *County of Sacramento*, *supra*. Such a determination is, by definition, fact specific and not "a calibrated yardstick." *Id.* at 1708.

In the instant case, the alleged governmental interest is to acquire open space. The facts established on the record, however, demonstrate that the open space was acquired by knowing violation of the laws governing the conduct of the Township in the land use context and by a blatant abuse of power to the detriment of Noble.

Whether or not the Township's conduct "shocks the conscience" in a constitutional sense, this Court should state the analysis for that determination in a land use context. If this matter is analyzed in the fashion that this Court approached *Nollan* and *Dolan*, Noble would not be precluded as a matter of law from taking this case to trial.

CONCLUSION

The purpose of the "shocks the conscience" standard is not to avoid judicial review of local government actions. The purpose of the standard is to determine when such local government actions constitute such an egregious abuse of power as to rise to the level of a constitutional violation. This Court should provide the appropriate analysis of the standard in the land use context.

For these reasons and those stated above, the petition for a writ of *certiorari* should be granted and the judgment below reversed.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4476

THORNBURY NOBLE, LTD.

Appellant

v.

THORNBURY TOWNSHIP, ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 99-6460)
District Judge: Honorable Thomas N. O'Neill

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 28, 2004

Before: RENDELL, FUENTES, and
SMITH, *Circuit Judges*.

(Filed: October 18, 2004)

OPINION OF THE COURT

FUENTES, *Circuit Judge*.

Appellant Thornbury Noble ("Noble") is the owner of a property in Thornbury Township, Chester County ("the Township") known as "Thornbury Commons" ("the Property").

Noble had hoped to convince Thornbury Township Board of Supervisors ("the Board") to rezone the Property to allow for the construction of a box-shaped supermarket, but was unsuccessful. The Board, however, did grant another developer, Waters & Associates ("Waters"), the zoning changes necessary to build a supermarket at another site in the Township. Noble contends that Waters' zoning request was approved more quickly because Waters agreed to make a $600,000 contribution to the Township for the purchase of open space. Noble filed a four count complaint in the Eastern District of Pennsylvania against the Township, the Board, and members of the Board in their individual and official capacities (collectively referred to as "the Defendants"), which included a claim that Noble's substantive due process rights pursuant to 42 U.S.C. § 1983 had been violated.[1] Through a series of decisions, the District Court dismissed all the counts in the complaint. The substantive due process claim is what is before us on appeal.[2] We affirm the decision of the District Court because there is no genuine issue of material fact as to whether the actions of Defendants shock the conscience, even when viewed in the light most favorable to the plaintiff.

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[1] Section 1983 provides a cause of action for "any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of law." *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002). Noble's § 1983 claims here stem from alleged violations of substantive due process rights under the Fourteenth Amendment. The complaint also alleged: a violation of the Pennsylvania Municipalities Planning Code (Count II); a regulatory taking (Count III), and a claim for intentional interference with prospective contract (Count IV).

[2] The four issues Noble raised on appeal are all related to the substantive due process claim.

I. Factual and Procedural Background

The facts and evidence are adequately set forth in the District Court opinion, thus only the barest recitation is required here. Thornbury Noble, a limited partnership, is the owner of the Property in the Township. The Township is governed by the Board, a five member elected body. The Township has enacted a zoning ordinance which governs development in the Township. In November 1997, Noble sought to bring a supermarket to the property. A few years earlier, Noble had sought and received permission to develop an L-shaped retail center. To build the desired supermarket, however, the Property would have to be rezoned to permit a box-shaped building. While Noble was attempting to convince the Board to make the zoning changes, Waters was also trying to rezone a piece of property to permit the building of a shopping center that would include a supermarket. During a meeting to discuss Noble's zoning request, a Board member asked Noble's representative if he had any interest in making a voluntary contribution to help the Township acquire open space to compensate for the loss of residential zoning. The representative responded that a contribution would be considered if there were an ordinance asking for such a contribution. Waters, however, contributed $600,000 to the Township for the express purpose of purchasing additional open space. There was evidence that at least one Board member believed only one supermarket would get built and at least one Board member wanted the Waters supermarket built first. The Board approved the zoning changes requested by Waters. While Noble was fighting to have its zoning changes adopted, it lost two supermarket deals. The District Court originally dismissed the § 1983 claims against the individual Defendants in their official capacities, but

otherwise denied the Defendants' motions for summary judgment with respect to Count I. The Defendants, however, renewed their motions for summary judgment after this Court handed down *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir. 2003). The District Court concluded that the actions of the Defendants did not meet the shock the conscience standard laid out in *United Artists* for making out a successful substantive due process claim in a land-use setting.

II. Standard of Review

When reviewing a grant or denial of summary judgment, "we apply the same test employed by the District Court under Federal Rule of Civil Procedure 56(c)." *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.,* 343 F.3d 669, 679-80 (3d Cir. 2003). Thus, a District Court's grant of summary judgment must be affirmed only if it appears that there is no genuine issue as to any material fact and that Appellees are entitled to a judgment as a matter of law. Id. In evaluating the evidence, we take the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *Id.*

III. Discussion

Noble argues that there are genuine issues of material fact as to whether the Defendants violated Noble's substantive due process rights. "The substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'" *Fagan v. City of Vineland,* 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc). Under Third Circuit law, the "shock the conscience"

standard applies to cases involving substantive due process claims challenging municipal land use decisions. *United Artists,* 316 F.3d at 401. "While the measure of what is conscience-shocking is no calibrated yard stick," *County of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998), we do know that conscience shocking actions would violate the "decencies of civilized conduct," *Rochin v. California,* 342 U.S. 165, 172-73 (1952), and would be so " 'brutal' and 'offensive' that [they] did not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram,* 352 U.S. 432, 435 (1957).

The most nefarious interpretation of the events that transpired before the Board would be that the Board privileged Water's zoning request over Noble's in exchange for Water's $600,000 contribution to the Township for the purchase of open space. Assuming that is the case, the actions of the Board would still not rise to the level of shocking the conscience because it is well-settled that the preservation of open spaces is a legitimate municipal goal. *Agins v. City of Tiburon,* 447 U.S. 255 (1980), overruled on other grounds by *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987). Because Defendants' actions do not constitute an abuse of power that shocks the conscience, Noble's substantive due process rights have not been violated.

Noble makes much of the District Court's observation that the actions of the Board were not undertaken for personal gain. Contrary to Noble's contention, the District Court did not conclude that only actions that personally benefit the Board members would meet the shock the conscience test. Instead, the District Court's observation suggested, correctly so, that soliciting a $600,000 contribution to line the pockets of the Board members is an act

different from soliciting a $600,000 contribution to secure open space. Since the contribution was expressly to pursue a legitimate town goal, neither the Board's motives nor their actions were improper.[3] Thus, we cannot find in the instant case that the Board's actions were unconstitutional.[4]

We have considered all of the other arguments advanced by the parties and conclude that they are without merit and no further discussion is necessary. Accordingly, the judgment of the district court will be affirmed.

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[3] Noble similarly misconstrues the District Court's observations regarding the Board's motive. Because the Board's motives were legitimate, it was not necessary for the District Court to decide whether an improper motive in the instant case would have transformed an otherwise legitimate action into one that shocked the conscience.

[4] Noble also raises on appeal the issue of qualified immunity for the individual Board members. We need not address the issue of qualified immunity because no constitutional violation occurred.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4476

THORNBURY NOBLE, LTD.

Appellant

v.

THORNBURY TOWNSHIP, ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
99-6460
District Judge: Honorable Thomas N. O'Neill

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
September 28, 2004

Before: RENDELL, FUENTES and SMITH,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on September 28, 2004.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district

court entered October 22, 2003, be and the same is hereby affirmed.

Costs taxed against Appellant.

Attest:

/s/ Kathleen Brouwer
Chief Deputy Clerk

DATED: October 18, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	
	:	CIVIL ACTION
v.	:	No. 99-6460
THORNBURY TOWNSHIP, et al.	:	September 20, 2000
	:	
O'Neill, J.	:	

MEMORANDUM

(Filed Sept. 20, 2000)

Presently before me is defendants' motion to dismiss the complaint on a variety of grounds. For the reasons stated below, the motion will be denied in part and granted in part.

I.

For the purposes of this motion, I assume that the well-plead factual allegations in the complaint are true.

Plaintiff Thornbury Noble, Ltd. owns a property known as "Thornbury Commons" at the intersection of Routes 926 and 202 in Thornbury Township, Pennsylvania. Complaint ¶ 13. In March 1995, plaintiff received approval for a zoning and site plan for that property from defendant Thornbury Township Board of Supervisors (the "Board"). *Id.* ¶ 14. The plan called for an "L-shaped," strip-style building. *Id.* ¶ 15.

In November 1997, plaintiff sought to change the approved plan for Thornbury Commons to allow for a 50,000 square foot supermarket. *Id.* ¶ 16-18. The revised plan was taken before the Board on July 7, 1998. *Id.* ¶ 37-42. At that

meeting, two of the Board members requested a "contribution" from plaintiff in order to "compensate" the Township for the loss of residential zoning. *Id.* ¶ 41. Plaintiff declined to make such a contribution unless specifically authorized by ordinance. *Id.* ¶ 42, Exhibit F. One of the Board members responded that such contributions had previously been made to the Township "voluntarily." *Id.* Plaintiff continued to decline to make such a contribution because it believed such a payment would constitute "contract zoning" in violation of the Pennsylvania Municipalities Planning Code.[1] In November 1998, the Board rejected plaintiff's plans for a supermarket at Thornbury Commons. *Id.* ¶ 48.

Plaintiff further alleges that while the Board was considering its plans for a supermarket, R.J. Waters Associates, a second developer, was also pursuing plans for a supermarket at a second site in the Township. *Id.* ¶ 22. In that instance, Waters agreed to make a contribution of $600,000 to the Township in exchange for the rezoning that was necessary to build the supermarket. *Id.* ¶ 31. Plaintiff claims that the Board thereafter stopped considering its zoning requests on the merits in an effort to promote the Waters project. In support of this contention, plaintiff points to correspondence from one of the Board

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[1] The MPC states that: "No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act." 53 Pa.C.S.A. § 10503-A(a). In Count II, plaintiff contends that this solicitation of a "voluntary contribution" violated this provision of the MPC.

members which states: "One key issue is not having this [the concerns of an adjacent property owner about the Waters plan] slow down the Waters' project since we want them to be able to lay the first brick and assure their supermarket will be the next one built to enable our funding for the next phase of the Dallet tract acquisition effort." *Id.* ¶ 33, Exhibit E. The plan for the Waters' project was approved at the same meeting where the Board rejected the plan for plaintiff's project. *Id.* ¶¶ 48-49.

II.

In Count I, plaintiff alleges that defendants violated its substantive due process rights. Defendants' motion to dismiss this Count will be denied.

As a general matter, "federal courts are reluctant to sit as appeal boards for disputes between land developers and a Township's planning body." *Woodwind Estates, Ltd. v. W.J. Gretkowski,* 205 F.3d 118, 122 (3d Cir. 2000). Nonetheless, developers have a due process right to be free from "arbitrary and irrational zoning actions." *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 263 (1977); *see also Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988) (a zoning action violates due process if it is "arbitrary, irrational, or tainted by improper motive"). This due process protection includes the right to be free from governmental decisions made for improper economic motives. *See Parkway Garage, Inc. v. City of Philadelphia,* 5 F.3d 685, 695 (3d Cir. 1993) (reversing the grant of a Rule 50 motion because jury could have reasonably concluded that City closed parking garage for an "improper economic motive" – namely, "the garage had considerably

more value to the City if it could relieve itself of the Parkway lease").

Plaintiff argues that the Board's rejection of its plan for a supermarket at Thornbury Commons violated this substantive due process right because: 1) consideration of its plan was made contingent upon its making a contribution to the Township that is allegedly illegal under state law; and 2) its plan was rejected in order to give an unfair advantage to another developer who had agreed to make such a payment. Defendants implicitly concede that if these allegations were proven a reasonable person could conclude that the Board acted with an improper motive. Defendants argue, however, that plaintiff can succeed with its claim "only if the [Board] could have had no legitimate reason for its decision." *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1034 (3d Cir. 1987). Defendants further argue that the same documents plaintiff relies upon to create an inference of improper motive also state legitimate justifications for the Board's action. For example, the minutes of the July 7, 1998 Board meeting show that one of the members commented that "many residents are opposed to converting [the zoning at Thornbury Commons] from residential to commercial." *See* Complaint, Exhibit F at 2. Defendants believe that this evidence of competing motivations requires dismissal of this Count.

Defendants misconstrue plaintiff's burden. *Pace* did state in passing that "federal judicial interference with a state zoning board's quasi-legislative decisions . . . is proper only if the governmental body could have had no legitimate reason for its decision." *Pace,* 808 F.2d at 1034. However, the court's analysis of the complaint in that case was not as deferential to the Township as that one sentence would seem to imply. In holding that the complaint

failed to state a claim for a substantive due process violation, the *Pace* Court emphasized that a plaintiff need only "allege facts that would support a finding of arbitrary or irrational legislative action by the Township." *Id.* at 1035. In that case, the complaint failed to do so because it contained only "conclusory pleadings" that "fail[ed] to make *any* factual allegations that indicate irrationality." *Id.* (emphasis added). However, the *Pace* Court did not address the situation where, as in this case, the complaint contains specific factual allegations of improper motive but also provides benign alternative explanations for the questioned actions.

The Court of Appeals did, however, address a similar situation in *Bello.* In that case, the District Court entered summary judgment against a developer who claimed that municipal officials had improperly denied building permits. *Bello,* 840 F.2d at 1126-27. Plaintiffs claimed that the permits were denied "for partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* at 1129. Defendants presented "an arguably rational ground" for the denials; namely, "plaintiffs' failure to build in numerical sequence." *Id.* at 1130. The Court of Appeals contrasted this situation with the facts in *Pace* and concluded that "it is the factfinders' role to resolve this factual dispute." *Id.* On this basis, the summary judgment was reversed. *See also Woodwind Estates,* 205 F.3d at 125 (reversing the grant of a Rule 50 motion because evidence presented at trial "*could* provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval [for a low-income housing subdivision plan] was made in bad faith or was based upon an improper motive") (emphasis added).

The issue in *Bello* and *Woodwind Estates* was whether the plaintiffs had amassed sufficient evidence from which a reasonable jury could find improper motives. Here, on a motion to dismiss, plaintiff has a lesser burden. It need only allege facts which if proved would be sufficient to support a finding of improper motive. Plaintiff has met its burden.

III.

In Count II, plaintiff claims that defendants violated § 10503-A(a) of the Pennsylvania Municipalities Planning Code during the July 7, 1998 Board meeting when plaintiff was asked to make a "voluntary contribution" to "compensate" the Township for the loss of residential zoning. Defendants argue that the MPC claim is untimely because it was not filed within 30 days of the Board's decision.

However, it is unclear whether there is a private cause of action under the MPC, and plaintiff concedes that it cannot point to "any case law that establishes a separate cause of action for a violation of the MPC." Plaintiff's Mem. at 15. Therefore, before reaching the statute of limitations issue I will Order the parties to brief the question of whether there is a private cause of action under the MPC.

IV.

In Count III, plaintiff claims that defendants effected a temporary regulatory taking of Thornbury Commons during the period in which the Board was considering the supermarket zoning plan. Defendants' motion to dismiss this Count will be granted.

The Fifth Amendment prohibits private property from "be[ing] taken for public use, without just compensation." Since Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), the Supreme Court has consistently held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court has since "described at least two discreet categories of regulatory action" that are compensable as takings. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). The first category comprises those regulations that "compel the property owner to suffer a physical 'invasion' of his property." *Id.* The second category comprises those regulations that "den[y] all economically beneficial or productive use of land." *Id.* Moreover, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304, 318 (1987), the Court recognized that a temporary regulatory taking is not "different in kind" from a permanent deprivation.

Since it is clear that plaintiff's property was never physically invaded, its taking claim can survive only if it can allege that it was denied "all use" of it [sic] property for the period of time in question. *See Bello,* 840 F.2d at 1130. It is not enough for plaintiff to allege that it was "merely denied a particular [] permit, [but] retained the right to put [its] land to a variety of alternative uses." *Id.* However, that is exactly what happened. Although plaintiff experienced delays in the Board's consideration of its plan for a supermarket, throughout that period plaintiff had approvals for its "L-shaped," strip mall plan. In fact, when the supermarket plan was finally rejected, plaintiff proceeded with that original plan. *See* Plaintiff's Mem. at 8. Although the supermarket plan may have been more

profitable, plaintiff was not denied all economically beneficial use of its land. Therefore, there was no temporary taking and Count III will be dismissed.

V.

In Count IV, plaintiff asserts a state law claim for intentional interference with contractual relations. Defendants' motion to dismiss this Count will be granted as to defendants Thornbury Township and Thornbury Township Board of Supervisors but denied as to the individual Board members.

Defendants argue that this tort claim is barred by the immunity afforded to municipalities and their officials by the Political Subdivision Tort Claims Act. *See* 42 Pa.C.S.A. § 8541, *et seq.* Plaintiff concedes that the municipal defendants are immune from suit, but argues that the individual Board members are not immune from claims for intentional torts, including intentional interference with contractual relations.

42 Pa.C.S.A. § 8550 provides that there is no immunity for municipal officials that cause injury through "a crime, actual fraud, actual malice or willful misconduct." In *Delate v. Kolle,* 667 A.2d 1218, 1221 (Pa. Commw. 1995), the court applied that provision to a case arising from a zoning dispute and held that "the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful conduct which is necessary for a finding of willful misconduct [within the meaning of § 8550]." However, the court went on to note that in this context "willful misconduct" is synonymous with the term "intentional tort." *Id.* Therefore, individual zoning board members could be held liable if they "intentionally reached

the wrong decision knowing that it was wrong, acted from corrupt motives, or engaged in any other type of conduct which would demonstrate willful misconduct." *Id.*

I therefore hold that if it were confronted with the issue the Pennsylvania Supreme Court would find that the intentional interference with contractual relations alleged here constituted willful misconduct within the meaning of § 8550 and *Delate.* On this basis, I will deny the motion to dismiss Count IV as to the individual Board members but grant it as to the municipal defendants.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	
	:	CIVIL ACTION
v.	:	No. 99-6460
THORNBURY TOWNSHIP, et al.	:	

ORDER

AND NOW, this 20 day of September, 2000, after consideration of defendants' motion to dismiss, and plaintiff's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendants' motion to dismiss Count I (substantive due process) is DENIED;

2. Defendants' motion to dismiss Count II (violation of the Pennsylvania MPC) is DENIED WITHOUT PREJUDICE subject to renewal within 20 days with appropriate briefing on whether there is a private cause of action under the Pennsylvania MPC. Plaintiff may respond 20 days thereafter;

3. Defendants' motion to dismiss Count III (temporary regulatory taking) is GRANTED;

4. Defendants' motion to dismiss Count IV (intentional interference with contractual relations) is GRANTED as to defendants Thornbury Township and Thornbury Township Board of Supervisors and DENIED as to the remaining defendants.

/s/ TN O'Neill
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	
	:	CIVIL ACTION
v.	:	No. 99-6460
THORNBURY TOWNSHIP, et al.	:	

ORDER

(Filed Nov. 9, 2000)

AND NOW, this 9 day of November, 2000, after consideration of defendants' motion to dismiss Count II (violation of the Pennsylvania Municipalities Planning Code), and plaintiff's response thereto, it is hereby ORDERED that the motion is GRANTED and Count II is DISMISSED.

By Memorandum and Order dated September 20, 2000, I dismissed portions of plaintiff's complaint and ordered the parties to brief whether a private cause of action exists under the Pennsylvania Municipalities Code. After consideration of those briefs, I will dismiss Count II of the complaint because I believe that if presented with the issue the Pennsylvania Supreme Court would rule that no such cause of action exists.

The parties agree that the MPC contains no explicit private cause of action for the type of violation plaintiff complains of and there is no case law recognizing such a cause of action. In such situations, Pennsylvania courts look to three factors. First, is the plaintiff part of the class for whose benefit the statute was created? Second, is there an indication of legislative intent, explicit or implicit, either to create or deny such a remedy? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? *See Alfred M. Lutheran*

Distribs., Inc. v. A.P. Weilersbacher, Inc., 650 A.2d 83, 87 (Pa. Super. 1994).

In this case, the second factor is dispositive. 53 Pa.C.S.A. § 11001-A states that: "The procedures set forth in this article shall constitute the exclusive mode for securing review of any decision rendered pursuant to Article IX [relating to Zoning Hearing Board Proceedings] or deemed to have been made under this act." This is an explicit statement of legislative intent that limits the remedies available to plaintiff under these circumstances to mediation (53 Pa.C.S.A. § 10908.1) or an action in Mandamus (53 Pa.C.S.A. § 10910.1).

Plaintiff's argument that § 10503(11) should be read *in pari materia* to § 10506-A (thereby creating a private cause of action) fails for the same reason. The *in pari materia* rule of statutory construction applies only when a statute is ambiguous. *See In re McFarland's Estate,* 105 A.2d 92, 95 (Pa. 1954). The unambiguous language of § 11001-A leaves no room for the application of the *in pari materia* rule of construction. Moreover, even if *in pari marteria* did apply, the civil cause of action that plaintiff asks be recognized is far broader in scope than an appeal under § 10506-A.[1]

/s/ TN O'Neill
THOMAS N. O'NEILL, JR., J.

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[1] 53 Pa.C.S.A. § 10506-A provides for an appeal from an assessment of an impact fee. Appeals are available to persons who have been "required" to pay an impact fee and the only relief available is a modification or recession of the assessment at issue. *Id.* In this case, plaintiff was not "required" to pay any fee to the Township and, in fact, did not pay any fee to the Township.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, et al.	:	NO. 99-6460
O'NEILL, J.		MARCH 19, 2002

MEMORANDUM

(Filed Mar. 20, 2002)

Presently before me is defendants' motion for summary judgment on the remaining counts of plaintiff's complaint. For the reasons stated below, the motion will be granted in part and denied in part.

BACKGROUND[1]

Plaintiff Thornbury Noble owns property (hereinafter referred to as "Thornbury Commons") at the intersection of routes 926 and 202 in Thornbury Township, Chester County, Pennsylvania. Thornbury Commons is zoned "B" Business, and Thornbury Noble secured approval of a final zoning and site plan for the construction of an "L-shaped," strip-style complex of retail stores from defendant Thornbury Township Board of Supervisors ("the Board") on March 7, 1995. Sometime thereafter plaintiff received letters from SuperFresh and Genaurdi's supermarkets, each of which expressed an interest in building a store on Thornbury Commons. In November of 1997, Thornbury

[1] As it is defendants who have moved for summary judgment all facts are construed in the light most favorable to plaintiff.

Noble decided to change the previous plan and replace the "L-shaped" retail building with a 50,000 square foot "box-shaped" supermarket. In order to improve access and on-site traffic circulation, Thornbury Noble proposed to re-zone two acres of adjacent residential property to "B" Business. On December 16, 1997, representatives of Thornbury Noble and Genaurdi's submitted a concept plan to the Board for a box-shaped building housing a Genaurdi's supermarket.

The new plan was discussed at a Board meeting attended by representatives of Thornbury Noble, Genaurdi's, and residents living near Thornbury Commons on July 7, 1998. At that meeting defendant board member William Schmidt asked plaintiff's representative if plaintiff had "any interest in helping the township with open space to compensate for the loss of residential zoning." Plaintiff asserts that it declined to make such a contribution because it was not required under Thornbury Township Ordinances. When plaintiff's representative brought this to the attention of the Board during the meeting, defendant board member Robert MacDonnell responded by stating that such contributions had previously been made voluntarily. The status of Thornbury Noble's requested re-zoning was left unresolved by the Board at meetings throughout the summer of 1998. In the interim Thornbury Noble was advised by its attorney and civil engineers that a supermarket could be built under the zoning permits it had already obtained for the construction of the L-shaped building complex. Sometime after the July 7, 1998 meeting, Richard Dugan, Genaurdi's real estate director, contacted MacDonnell in an attempt to learn the Board's position on re-zoning Thornbury Commons. MacDonnell told Dugan that the Board did not look favorably on re-zoning and as a

result Genaurdi's opted to look elsewhere to lease super market space.

On October 6, 1998, Thornbury Noble submitted an application for amendment of its prior approved plan to allow construction of a food market on Thornbury Commons as currently zoned or in the alternative for the re-zoning as it had previously proposed on July 7, 1998. The application was forwarded by the Board for review by the Chester County Planning Commission, the Thornbury Township Planning Commission, and the Township Engineer.[2] On November 3, 1998, the Board rejected plaintiff's request to re-zone the two acres. Although too late to affect the Board's decision, by letter dated November 23, 1998, the Chester County Planning Commission recommended that plaintiff's re-zoning request be approved. Plaintiff's alternative request to amend its former final plan and build the supermarket on Thornbury Commons as currently zoned was not resolved at the November 3, 1998 meeting.

After failing to secure a contract with Genaurdi's Thornbury Noble entered into discussions with SuperFresh with the aim of building the supermarket on the property as currently zoned. On January 13, 1999, representatives from SuperFresh presented a sketch plan to the Township Planning Commission demonstrating that Thornbury Commons could sustain a supermarket with the current permits granted to Thornbury Noble for the construction of its L-shaped shopping complex. On January

[2] These entities provide non-binding recommendations to the Board of Supervisors.

19, 1999 the Board determined that the plan submitted by Thornbury Noble on October 6, 1998 was not an "amended" plan but would be considered as an entirely new application for land development. Further, by letter dated February 3, 1999, the township solicitor informed plaintiff's counsel that this new application would also require "conditional use approval" as well. These determinations required further substantial delays in securing approval for any potential development plan for Thornbury Commons, and as a result SuperFresh allegedly abandoned its plan to build a store on plaintiff's property. According to plaintiff it was "forced" to proceed with the original "L-shaped" shopping center.

The crux of plaintiff's complaint is that defendants' motives in denying Thornbury Noble's zoning requests were improper. In support of this assertion, plaintiff alleges that while the Board was considering Thornbury Noble's plans for a supermarket R.J. Waters & Associates, a second developer, was also pursuing plans for a supermarket at another site in the Township. According to plaintiff the Board was initially opposed to the development of the tract owned by Waters. However after agreeing to make a contribution of $600,000 to the Township, Waters was granted the re-zoning necessary to build a supermarket. Plaintiff claims that the Board thereafter stopped considering Thornbury Noble's zoning requests in an effort to promote the Waters project and actively encouraged Gernuardi's to locate its grocery store on the Waters' tract, assuring Genaurdi's that Waters' approvals would be forthcoming sooner than Thornbury Noble's. The plan for the Waters' project was approved on November 3,

1998 at the same meeting at which the Board rejected plaintiff's re-zoning request.

PROCEDURAL HISTORY

On December 17, 1999, Thornbury Noble filed the instant suit against Thornbury Township, its current Board of Supervisors and five individuals who were members of the Board during the period relevant to this law suit: Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Charles A.W. Wilson, and Robert A. MacDonnell. Plaintiff's suit alleged: a violation of its civil rights pursuant to 42 U.S.C. § 1983 (Count I); violation of the Pennsylvania Municipalities Planning Code (MPC), 53 Pa. Cons. Stat. § 10503(11) (Count II); a regulatory taking (Count III); and a claim of intentional interference with prospective contract (Count IV). On September 20, 2000, I granted defendants' motion to dismiss Count III in its entirety, and Count IV as to the Township and Board only. On November 9, 2000 I granted defendants' motion to dismiss Count II in its entirety. Before me now are motions for summary judgment filed by Thornbury Township and the Board (hereinafter "the municipal defendants") on Count I and by the individual defendants on Count I and Count IV.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law." Fed. R. Civ. P. 56(c). My task is not to resolve disputed issues of fact, but to determine whether there exist any factual issues to be tried. *See Andersen v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-49 (1986). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party. *Id.* at 248. However, the non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester,* 891 F.2d 458, 460 (3d Cir. 1989). "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." *Big Apple BMW, Inc. v. BMW of North America, Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992).

DISCUSSION

All defendants move for summary judgment with respect to plaintiff's § 1983 claim on the grounds that plaintiff has failed to establish a property right entitled to protection, plaintiff's claim is not ripe and plaintiff has failed to allege sufficient evidence of improper motive. In addition the individual defendants have raised various immunity defenses and also have moved for summary judgment on plaintiff's claim of intentional interference with prospective contract.

I. § 1983

To establish a claim under § 1983,[3] plaintiff must show that its federal statutory or constitutional rights were violated by a person or entity acting under color of state law. *See Flagg Bros., Inc. v. Brooks,* 426 U.S. 149, 155 (1978). Plaintiff's § 1983 claim alleges a violation of its substantive due process rights under the Fourteenth Amendment. Defendants[4] have opted to address plaintiff's claim in two parts: (1) the denial of plaintiff's request to re-zone a portion of Thornbury Commons to better accommodate a supermarket, and (2) the classification of plaintiff's alternative request to amend its prior plan as a "new" application requiring a conditional use application. These two plans were submitted by plaintiff as alternatives at the same time on October 6, 1998. The individual defendants assert without citation that "[i]n light of the two vastly different forms of government action at issue, [I] must employ separate analyses" in evaluating the decisions of the Board. (Ind. Def.'s Br. at 1-2).

Throughout their briefs defendants address these two "decisions" as if they are totally unrelated. Defendants' submissions contain rhetoric laden statements such as: "plaintiff is attempting to change the law of the state . . .

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[3] 42 U.S.C. § 1983. Section 1983 provides in relevant part: "Every person . . . who, under color of any statute, ordinance [or] regulation . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured."

[4] The individual defendants "adopt[ed] and incorporate[d] by reference the arguments presented by [municipal defendants] that plaintiff has failed as a matter of law to demonstrate any claim under 42 U.S.C. § 1983." (Ind. Def.'s Br. at 15).

by ignoring legislative immunity and overlooking the ripeness doctrine . . ."; plaintiff "is now before the Court claiming it should have gotten a bigger development", *id.* at 2; "[n]o court . . . has extended substantive due process to protect the right of a landowner to have its property zoned in any manner the landowner wishes", (Mun. Def.'s Br. at 9); and "[i]n a vain effort to create a genuine issue of material fact, plaintiff attempts to blur the distinction between a request for rezoning and an application for approval of a land development plan," (Ind. Def.'s Rep. Br. at 1). In my view these statements mischaracterize plaintiff's claim. Plaintiff is not challenging the power of the Board to render the decisions it made, but rather the manner in which it made them. Plaintiff contends that it is entitled to have those decisions made free from biased or improper motivations.

Plaintiff has provided evidence that its development plan was deliberately impeded in favor of the Waters project following Waters' $600,000 "voluntary contribution" to the township. According to plaintiff, the Board's actions are not separable and the Board's designation of plaintiff's "amended" plan as a "new" plan requiring a conditional use application was simply "a continuation of the earlier plan by the Township to thwart Thornbury Noble's effort to build a supermarket on the property." (Pl. Br. in Opp. to Mun. Def.'s at 22-23). However, as defendants have chosen to structure their motions for summary judgment by addressing the two "decisions" of the board separately I will address each issue in the order raised.

Defendants claim that plaintiff cannot claim a substantive due process violation under § 1983 with respect to the Board's denial of its re-zoning request because it cannot establish that a fundamental property interest was

affected by the Board's decision. With respect to the Board's treatment of plaintiff's alternative amended plan defendants argue: (a) this determination is not ripe for adjudication, and (b) there is insufficient evidence to support plaintiff's claim of improper motive.

A. Property Right

Plaintiff may not proceed with its § 1983 claim unless it can establish that it possessed a property interest worthy of substantive due process protection. *See Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority,* 103 F.3d 1165, 1179 n. 12 (3d Cir. 1997) ("Regardless of whether the decision was motivated by bias, bad faith, or partisan or personal motives [p]laintiff cannot maintain a substantive due process claim unless it can demonstrate that [d]efendants infringed a fundamental property right of [p]laintiff."). Defendants have moved for summary judgment on the grounds that Thornbury Noble "did not possess a property right to have [a portion of its property] re-zoned to commercial in order to build the supermarket on the site." (Mun. Def. Br. at 9). Defendants assert that under Pennsylvania law a land owner has no "vested right" in the continuation of a zoning classification, much less a request to re-zone a parcel of land, and that Pennsylvania courts have consistently held that the decision to re-zone is solely at the discretion of the governing body acting in its legislative capacity. Relying on the Court of Appeals' statement in *Acierno v. Cloutier,* 40 F.3d 597, 616 (3d Cir. 1994) that "when analyzing substantive due process claims courts are required to turn to state and local law to determine whether the plaintiff possessed a property interest which was abrogated by government action," defendants contend that "[p]laintiff enjoyed no

entitlement to re-zoning . . . and did not possess a property right worthy of substantive due process protection." (Mun. Def. Br. at 9).

The Court's statement in *Acierno,* however, took place in the context of its determination that a town council was entitled to qualified immunity from suit because the *Acierno* plaintiff did not have a "clearly established constitutional right" to develop his property in the manner he sought. *Acierno* does not stand for the proposition that simply because state law grants a government agency unfettered discretion in making decisions affecting individual property rights that those rights are therefore automatically placed outside federal substantive due process protections. In *DeBlasio v. Zoning Board of Adjustment,* 53 F.3d 592, 600 (3d Cir. 1995), the Court stated: "in order to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest." In subsequent decisions the Court has acknowledged that "the case law of this circuit and the Supreme Court provides very little guidance as to what constitutes this 'certain quality' of property interest worthy of protection under the substantive due process clause." *Nicholas v. Pennsylvania State University,* 227 F.3d 133, 140 (3d Cir. 2000) (citations and internal quotations omitted). Nevertheless, according to the Court of Appeals, "the case law does reveal one guiding principle: whether a certain property interest embodies this 'particular quality' is not determined by reference to state law, but rather depends on whether that interest is 'fundamental' under the United States Constitution." *Id.*

In *DeBlasio* the Court stated:

> [In] the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

53 F.3d at 601. Defendants attempt to distinguish Thornbury Noble's situation from that at issue in *DeBlasio* by stating:

> It is important to point out that the [p]laintiff in *DeBlasio* did not seek rezoning of his property, but a use variance under state law which may be granted by a zoning authority under certain conditions. It is not the type of land use decision in which the zoning authority has absolute legislative discretion as in the case of a rezoning request.

(Mun. Def.'s Br. at 10, n. 3). Apparently defendants contend that the *DeBlasio* Court's statement regarding "governmental decisions that impinge upon a landowner's use and enjoyment of property" does not encompass rezoning decisions.[5] I disagree. *See Independent Enterprises,* 103 F.3d at 1179 n. 12 (noting that cases involving "zoning

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[5] The basis for this contention appears to stem from defendants belief that the decision the Board rendered was a "legislative act" that cannot be challenged as a substantive due process violation. I will discuss any immunities to which defendants may be entitled below.

decisions, building permits, or other governmental permission required for some intended use of land owned by the plaintiffs . . . implicate[s] the 'fundamental' property interest in the ownership of the land."); *Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988) (holding that the denial of building permits by a municipality for reasons unrelated to the merits of the permit applications implicated a fundamental due process right); *Neiderheiser v. Borough of Berwick,* 840 F.2d 213, 218 (3d Cir. 1988) (holding that a lessor who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that the exemption application was arbitrarily and irrationally denied); *United Artists Theatre Circuit, Inc. v. The Township of Warrington,* No. Civ. A. 98-5556, 2001 WL 936638 at *2 (E.D. Pa. Aug. 15, 2001) (denying defendants' motion for summary judgment where plaintiff's substantive due process claim arose out of two competing land use applications and plaintiff alleged its application was disfavored because of its failure to contribute a voluntary "impact" fee to the township).

B. Ripeness

Defendants also contend that plaintiff's claim of a substantive due process violation arising out of the Township's classification of its alternative amended plan as a "new" plan requiring a conditional use application should be dismissed on the grounds that it is not ripe for adjudication. Ripeness is one aspect of justiciability. It "determines when a proper party may bring an action." *Armstrong World Industries, Inc. v. Adams,* 961 F.2d 405, 411 (3d Cir. 1992). The function of the ripeness doctrine is to prevent federal courts, "through avoidance of premature adjudication, from entangling themselves in abstract

disagreements." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105 (1977). In short, ripeness is a question of timing that addresses "when . . . it [is] appropriate for a court to take up the asserted claim." *Felmeister v. Office of Attorney Ethics,* 856 F.2d 529, 535 (3d Cir. 1988) (internal quotations omitted).

In *Taylor Investment, Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1292 (3d Cir. 1993), a zoning officer had revoked a tenant's use permit and the Court held that the tenant's § 1983 claim was not ripe because the tenant had not given the municipality an opportunity to make a final determination with respect to the construction of the applicable ordinances. Specifically, the tenant had not reapplied for the permit, appealed the revocation to the Township Zoning Board or sought a variance or special exception to the township's zoning ordinances. *See id.* at 1289. Similarly, in *Sameric Corp. of Delaware, Inc. v. City of Philadelphia,* 142 F.3d 582, 598 (3d Cir. 1998), the Court held that because plaintiff had not completed its appeal of the city's denial of a demolition permit the denial was not final and therefore plaintiff's substantive due process claim was not ripe for adjudication. In arriving at this determination the *Sameric* court stated:

> It is well established that, in cases involving land-use decisions, a property owner does not have a ripe, constitutional claim until the zoning authorities have had an opportunity to arrive at a final, definitive position regarding how they will apply the regulations at issue to the particular land in question. Thus, we have held that property owners' constitutional claims based upon land-use decisions were premature where the owners or tenants were denied permits by

> the initial decision-makers but did not avail themselves of available, subsequent procedures

142 F.3d at 597 (citations omitted).

Section 115-15(A) of the Thornbury Township Subdivision and Land Development Ordinance (SALDO) states:

> All preliminary and final subdivision of land development plans shall be reviewed by the Township Planning Commission and the County Planning Commission and shall be approved or disapproved by the Board in accordance with the procedures specified in this article and in other sections of this chapter. Any application not processed as required hereafter shall be null and void unless it was made prior to the adoption of these regulations.

Section 115-18 allows for the voluntary submission of a "sketch plan" to the Township Planning Commission for Review but states:

> Such sketch plan shall be considered as submitted for informal discussions only between the developer and the Planning Commission. Submission of a sketch plan does not constitute submission of an application for approval of a subdivision or land development plan. The submission of a sketch plan shall not preclude the developer from proceeding with preliminary and final plan application as required in this chapter prior to the approval of a sketch plan by the board.

Essentially, defendants argue that plaintiff's October 6, 1998 submission to the Board entitled "Application for Amended Final Plan Approval or, in the alternative, for a Zoning Map Amendment" did not constitute a "preliminary" or "final" plan, and that "[t]here is no authority for

the submission of such a document in either the Township's SALDO or the [Pennsylvania Municipalities Planning Code]." (Mun. Def.'s Br. at 16). According to defendants the October 6 submission was merely a "sketch plan" and since a formal proposal was not submitted, the Township was never afforded the opportunity to reach a final determination concerning plaintiff's request. Plaintiff responds by asserting that the Board's determination that Thornbury Noble must submit a conditional use application and a new land development plan is simply part of defendants' effort to delay plaintiff's plan in favor of the Water's project.[6]

Plaintiff's amended plan was submitted to the Board on October 6, 1998. The Board then forwarded it for review by the Chester County Planning Commission, the Thornbury Township Planning Commission and the Township Engineer. On January 13, 1999 representatives of SuperFresh appeared before the Township Planning Commission "in order to present a sketch plan, which demonstrated that Thornbury Commons would sustain a supermarket within current B Business Lands. . . ."[7] (Pl's Comp. ¶ 55). On January 19, 1999 the Board decided that "any plan submitted by Thornbury Noble to the Township shall be presented as a new application and will not be considered as an amendment to an approved final plan." (Min. of the Brd. of Sup. Mtg. 1/19/199 [sic]). As alleged in

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[6] Should I hold that the Board's determination with respect to plaintiff's amended plan was distinct from its decision to reject plaintiff's re-zoning request, plaintiff maintains that conditional use approval should not have been applied to its application.

[7] The Township Planning Commission makes recommendations to the Board, but the Board has ultimate authority.

plaintiff's complaint, in January 13, 1999 the plan under consideration was a "sketch plan." Notwithstanding this allegation, plaintiff maintains the Board's classification is ripe for adjudication and asks that I determine that its amended plan was in fact a "final" and not a "new" plan.

Plaintiff asks that I examine such details as the plan's "base engineering information, storm water management and grading." (Pl.'s Resp. to Mun. Def.'s at 23). Further, plaintiff asks that I find that its amended plan did not constitute a "shopping center" under local zoning ordinances and therefore that plaintiff should not have been required to submit a conditional use application. *Id.* at 26. Mindful of the reluctance expressed by the Court of Appeals' in *Sameric* "to allow the Courts to become super land-use boards of appeals," 142 F.3d at 598, I decline to make such determinations. However, the basis for my decision is not because the Board has been denied the opportunity to render a final decision on these matters, but because, as I have noted previously, viewing the facts in the light most favorable to plaintiff this decision is not separable from the Board's rejection of plaintiff's rezoning request. The heart of plaintiff's challenge to the Board's decision regarding its alternative, amended plan is that it was motivated by "the obvious and settled intention of the Township to frustrate [plaintiff's] efforts to secure approval for a supermarket. . . ." (Pl's Resp. to Mun. Def. at 12). In other words plaintiff alleges that the Board classified its amended complaint as a "new" application requiring a conditional use permit in order to allow the Water's project to complete the application process ahead of Thornbury Noble. It is this alleged improper motivation that forms the basis for plaintiff's § 1983 claim. Defendants would have me view their decision regarding plaintiff's

alternative amended plan as if it were completely unconnected from plaintiff's prior submissions and interactions with the Board. I decline to do so. Viewing the facts in the light most favorable to plaintiff, the Board's treatment of plaintiff's amended plan may be considered further evidence of improper motivation to be believed or dismissed by the factfinder. As I do not consider it an independent source for a separate alleged § 1983 violation it is not a proper basis for a motion for summary judgment.

To the extent that defendants still maintain that plaintiff's § 1983 claim is not ripe for adjudication, I disagree. The situation before me is similar to the issue presented to the Court of Appeals in *Blanche Road Corp. v. Bensalem Township,* 57 F.3d 253, 267-68 (3d Cir. 1995), wherein plaintiffs alleged that officers of the Township "deliberately and improperly interfered with the process by which the Township issued permits, in order to block or delay the issuance of plaintiff's permits, and . . . did so for reasons unrelated to the merits of the application. . . ." The *Blanche Road* Court characterized this type of claim as "substantively different" from those presented in most ripeness cases involving challenges to zoning decisions and held that "internal review of the individual permit decisions is thus unnecessary to render such a claim ripe." *Id.* at 268. Applying this rationale to the case before me plaintiff need not establish that it followed proper procedure in order to establish that its claim is ripe for adjudication because the basis of its suit is that this procedure was deliberately interfered with. Accordingly, defendants' motion for summary judgment on the grounds that plaintiff's claim concerning its alternative amended plan is not ripe will be denied.

C. Improper Motive

Defendants contend that even if I find that plaintiff's claim is ripe "there is insufficient evidence as a matter of law to support [p]laintiff's claim of an improper motive attributable to [d]efendants and sufficient to hold the Township liable."[8] (Mun. Def.'s Br. at 11). To establish a substantive due process claim plaintiff must prove that it was deprived of a protected property interest by arbitrary or capricious government action. *See Taylor Investment,* 983 F.2d at 1290. Such a claim may be maintained where "the government's actions were not rationally related to a legitimate government interest or were in fact motivated by bias, bad faith or improper motive." *Sameric Corp. of Delaware, Inc. v. City of Phila.,* 142 F.3d 582, 590-91 (3rd Cir. 1998) (citations and internal quotations omitted). The Court employed a similar rationale in *Bello v. Walker,* 840 F.2d 1124 (3d Cir. 1988), stating:

> We need not define, at this juncture, the outer limits of the showing necessary to demonstrate that a governmental action was arbitrary, irrational, or tainted by improper motive. The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain

[8] Municipal defendants' argument that plaintiff has presented insufficient evidence of an improper motive is located under subsection "b" which appears with subsection "a," concerning ripeness, under the subheading: "2. Plaintiff's Request for Approval of a Land Development Plan to Build a "Big Box" Supermarket." It is unclear whether the argument involving improper motive is meant to apply to plaintiff's request to re-zone its property or only to plaintiff's alternative request to amend the existing plan. As in my view plaintiff's claim of improper motive is not separable into two distinct decisions, I will construe defendants' argument as one contending that plaintiff has failed to allege facts sufficient to establish an improper motive.

> council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983. While the defendants claim that the building permit was denied because of plaintiff's failure to build in numerical sequence, thus permitting an arguable rational ground for the denial of the permit, it is the factfinders' role to resolve this factual dispute.

840 F.2d at 1129-30. *See also Woodwind Estates, Ltd. v. W.J. Gretkowski,* 205 F.3d 118, 125 (3d Cir. 2000) (reversing the grant of a Rule 50 motion because evidence presented at trial "could provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval [for a low-income housing subdivision plan] was made in bad faith or was based upon an improper motive").

Defendants move for summary judgment on the basis that "there is no evidence . . . to suggest that the Township Board of Supervisors was motivated by economic interest with respect to [p]laintiff's property, or made payment to the Township a condition for any land use approval." (Mun. Def.'s Br. at 17). At best, according to defendants, plaintiff has presented evidence that two out of the five members of the Board "communicated the possibility of making contributions

to the Township as part of the re-zoning process." *Id.* at 18.[9] Relying on *Holt Cargo Systems, Inc. v. Delaware River Port Authority,* 20 F. Supp. 2d 803 (E.D. Pa. 1998), defendants maintain plaintiff's claim must fail.[10] I disagree.

First I note that according to the minutes of the Board's meeting on July 7, 1998, Supervisor Schmidt asked plaintiff's representative if it had any interest in "helping the township" compensate for loss of residential zoning. When plaintiff's representative stated that Thornbury Noble would do so if required by ordinance, Supervisor MacDonnell stated that these contributions have been made "voluntarily" in the past. These two statements were made in a public meeting attended by the entire Board. There is no question then that a majority of the board had knowledge of this motive. As for ratification, the other element mentioned by the *Holt* Court, in my view a reasonable juror could infer ratification from the Board's subsequent actions including: (1) the minutes of

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[9] Defendants point out that in any event these statements "were made in the context of discussions regarding rezoning the property, ***not*** land development." (Mun. Def.'s Br. at 17) (emphasis in original). This distinction is apparently made to distinguish defendants' alleged conduct from that specifically forbidden under the MPC, 53 Pa. Cons.Stat. § 10503-A, which states:

> No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized by this act.

[10] The *Holt* Court stated: "In order to impute the improper motives of two individuals to the [entire] board, plaintiffs must be able to show that a majority of the board knew of the improper motive and ratified it." 20 F. Supp. 2d at 841

the Board's meeting in May 1997 indicated the Board was not receptive to Waters' plan, but multiple Board members mentioned that re-zoning might be possible if a suitable tradeoff benefitting the town could be reached; (2) Waters eventually agreed to give the Township $600,000 for the purchase of property to be kept as "open space" in return for the re-zoning it sought; (3) the town favored the Waters project over plaintiff's as evidenced by the letter dated March 24, 1998 from Supervisor Wilson wherein he stated that it was important that Waters was assured that its was the next supermarket to be built in order to make sure that the "open space" property was developed; (4) the same letter also states that Wilson would not vote for any additional commercial property to be granted to plaintiff "so [Thornbury Noble is] not likely to get Gernaurdi as a lead tenant"; (5) the testimony of Richard Dugan, director of real estate for Genaurdi's in 1998, who stated that Gernaurdi's decision not to locate a store at Thornbury Commons was due to MacDonnell's representation that the Board did not look favorably on plaintiff's request; (6) during that same conversation Dugan testified that MacDonnell suggested Dugan "look at that piece that Waters was developing"; and (7) the Board did not wait for the recommendation of the Chester County Planning Commission before denying plaintiff's requested rezoning on November 3, 1998. On November 23, 1998 the Commission recommended that plaintiff's zoning request be granted.[11]

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[11] I note that defendants submitted a substantial amount of material suggesting that the Board had legitimate reasons for taking the actions it did. For example, the individual defendants contend that the minutes from a number of Board meetings indicate that plaintiff simply failed to comply with the reasonable requests of the Board and

(Continued on following page)

As plaintiff has generated genuine issues of material fact as to whether the actions of the Board were motivated by bias or improper motive, defendants' motion for summary judgment on that basis will be denied.

D. Immunity

i. Legislative Immunity for Individual Defendants

In arguing that plaintiff has not established the violation of a fundamental property right, defendants repeatedly note that the decisions made by the Board at issue in this case were made in its "legislative capacity." Defendants cite *East Lampeter Township v. County of Lancaster,* 744 A.2d 359, 364 (Pa. Commw. Ct. 2000), which states that "[w]hen a governing body acts on a rezoning application, it acts in its legislative capacity. Indeed, section 909.1(b)(5) of the [Pennsylvania Municipalities Planning Code] expressly declares actions by a governing body on proposed amendments to land use ordinances to be legislative acts. 53 P.S. § 10909.1(b)(5)." (citations omitted).

Absolute immunity from damage claims brought under § 1983 has been extended to members of legislative bodies for actions taken in a purely legislative capacity. *See Ryan v. Burlington County, N.J.,* 889 F.2d 1286, 1290 (3d. Cir. 1989). Such immunity does not extend however to those decisions rendered while performing "administrative" functions. *See id.* The applicability of such immunity to local governmental bodies rendering zoning decisions was examined in *Acierno v. Cloutier,* 40 F.3d 597 (3d Cir.

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for this reason his requests were denied. This however represents a factual dispute properly resolved by the factfinder.

1994). In *Acierno* the Court relied on a two-part test to determine whether actions are to be considered legislative for immunity purposes: "(1) the action must be 'substantively' legislative, which requires that it involve a policy making or line-drawing decision; and (2) the action must be 'procedurally' legislative, which requires that it be undertaken through established legislative procedures." 40 F.3d at 610.[12]

The "action" challenged by plaintiff was the Board's decision to reject its re-zoning request and alternative amended plan.[13] In examining whether a decision is

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[12] Individual defendants rely on *Bass v. Attardi*, 868 F.2d 45, 50 (3d Cir. 1989) which held that "members of municipal planning boards in New Jersey are absolutely immune in their individual capacities from damage actions brought pursuant to 42 U.S.C. § 1983 alleging equal protection and first amendment violations arising out of site plan review conducted pursuant to N.J. Stat. Ann. § 40:55D-25(a)(2) (West Supp. 1988)", and *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), holding that the elimination of a city department by municipal officials was protected by legislative immunity. In *Bass* the court held that "the duties of planning board members in the state of New Jersey are so integrally related to the judicial process as to warrant shielding from liability those individuals acting in performance of them," 868 F.2d at 50 (citations omitted), and in *Bogan* the Court held that the acts of introducing, voting for, and signing an ordinance eliminating a government office was legislative act entitled to protection. 523 U.S. at 46. While both of these cases involved local government officials, neither of them examined activities similar to those engaged in by the Board in the case before me. As the *Acierno* court examined legislative immunity in the context of a § 1983 action alleging that local government officials violated a landowner's substantive due process rights through its zoning decisions, I find its reasoning more applicable.

[13] Defendants again separate these two decisions, claiming absolute legislative immunity for their rejection of plaintiff's re-zoning request and qualified immunity for their reclassification of plaintiff's amended plan. As I find these two decisions inseparably linked, I decline to make such a distinction.

substantively procedural, the *Acierno* Court stated that one factor to consider is whether the action affected a single or small number of people. The narrow target of an action has often been seen by courts as an indication of an administrative, rather than legislative, act. *See id.* at 611. Plaintiff has provided evidence that the action taken by the Board specifically targeted Thornbury Noble in order to allow the Waters project to succeed. The *Acierno* Court warned, however, that even where a decision targets only one land owner it may constitute a substantively legislative act where it involves the "enactment or amendment of zoning legislation" as opposed to "simply the enforcement of already existing zoning laws." *Id.* at 611, *quoting Jodeco, Inc. v. Hann,* 674 F. Supp. 488, 494-95 (D. N.J. 1987). If plaintiff's allegations are accepted as true the Board was improperly obstructing plaintiff's legitimate requests to proceed with its development plans. Since the Board took no affirmative action, instead simply rejecting plaintiff's re-zoning request and refusing to recognize its alternative plan as an "amended final plan," in my view its actions cannot be characterized as the "enactment or amendment of zoning legislation." Even were its actions "substantively legislative" in character, however, the Board would still not be entitled to legislative immunity because its denial of plaintiff's re-zoning request was not "procedurally legislative." *See Acierno,* 40 F.3d at 610.

Under the "procedural prong" of the *Ryan* test, the members of the Board would be "entitled to absolute legislative immunity for [their] action[s] if they followed the statutory procedures specified for such action." *Id.* at 613 (citations omitted). With respect to its denial of plaintiff's re-zoning request municipal defendants state:

> Section 155-73 of the Thornbury Township Zoning Code sets forth the procedure that the Board of Supervisors will follow with respect to amendments to the zoning ordinance. Prior to any rezoning approval, the Board of Supervisors must hold a public hearing. No such hearing occurred in the instant case. Although the Township did not issue an official denial of Plaintiff's rezoning request, it is undisputed that Plaintiff never received its requested rezoning.

(Mun. Def.'s Br. at 7). Thus defendants admit that the proper procedures were not followed in handling plaintiff's request. As the actions of the Board were neither substantively nor procedurally legislative in character, defendants are not entitled to legislative immunity for their actions.

ii. Claims Against the Individual Defendants in Their Personal Capacities

Individual defendants move for the dismissal of plaintiff's § 1983 claims against them on the grounds that they are sued in their official capacity only and are therefore legally indistinct from the municipal body on which they serve. *See Satterfield v. Borough of Schuylkill Haven,* 12 F. Supp. 2d 423, 432 (E.D. Pa. 1998) (holding that official capacity suits under § 1983 against individual council members were unnecessary where the township was already a named defendant). In support of this contention individual defendants point out that plaintiff has specifically listed them in the caption of its complaint as

sued "in their official capacity."[14] Plaintiff responds without citation that: "[t]he caption of the complaint is not determinative" and "[t]he allegations of the complaint are conclusive on this issue." (Pl.'s Resp. to Ind. Def's at 14). Plaintiff also points to the fact that I recognized in my prior opinion denying defendants' motion to dismiss that its claim for intentional interference with contractual relations can only be brought against the individuals and not against municipal subdivisions. *Thornbury Noble, Ltd. v. Thornbury Township,* No. Civ. A. 99-6460, 2000 WL 1358483 at *4 (E.D. Pa. Sept. 20, 2000). However, this provides no support for plaintiff's contention that its § 1983 claim was brought against defendants in their personal capacity.

In responding to individual defendants' contentions plaintiff states: "Thornbury Noble's claims against the Township and the individuals in their official capacity are premised upon the misconduct of the Supervisors acting in their official capacity, and even if damages were recovered only from the Township, the individuals sued in their official capacities should nonetheless remain as parties." *Id.* at 14-15. Clearly plaintiff is suing defendants for actions conducted while in their capacity as township supervisors. However, the question before me is whether

[14] The actual terminology used by individual defendants is that they should not be "found individually liable." (Ind. Def.'s Rep. Br at 14). In responding plaintiff asserts that individual defendants may be held liable in both their "individual" and "official" capacities. As pointed out in *Satterfield,* however, there is no meaningful difference in a § 1983 suit between suing an official individually or suing the agency the official works for. I assume plaintiff is in fact arguing that it has sued individual plaintiffs in their "personal" capacity. *See infra* at 23 (discussing the difference between "personal" and "official" capacity suits under § 1983).

plaintiff has brought suit against each of them personally in addition to suing them collectively as a political subdivision.

In *Hafer v. Melo,* 502 U.S. 21, 25 (1991), the Supreme Court stated:

> Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, on the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.

(citations and internal quotations omitted). The *Hafer* Court affirmed the ruling of the Third Circuit Court of Appeals which stated: "[i]t appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity." 912 F.2d 628, 636 (3d. Cir. 1990). I note that in the defendants' answer, filed on December 6, 2000, under the caption "Second Affirmative Defense" it states: "All claims against the individual defendants are barred by application of the doctrine of qualified immunity as articulated in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)."

I hold that defendants had sufficient notice that they were sued in their personal capacity and will not grant their motion for summary judgment on that basis. As under *Satterfield* § 1983 claims against government agents in their official capacities are redundant where the agency is also under suit, I will dismiss plaintiff's claims against individual defendants in their official capacities.

iii. Municipal Liability Under § 1983

The individual defendants also state that "plaintiff cannot prevail unless it proves that its rights were violated by a government custom policy or practice or by an individual or body with final policy-making authority." (Ind. Def.'s Br. at 18). It is unclear whether defendants are claiming that they do not fall within the definition of a "body with final policy making authority" in general, or whether the above sentence is meant to be read in conjunction with the following paragraph asserting that a majority of a policy making body must be aware of and have ratified a decision before the actions of a minority of the members can be imputed to the entire body. To the extent that individual defendants claim they are not a body with final policy-making authority, I disagree. As defendants point out "the MPC, 53 Pa. C.S.A. § 10909.1(b)(5), grants exclusive jurisdiction to the Thornbury Township Board of Supervisors to decide whether to rezone a parcel of land within its jurisdiction." (Mun. Def.'s Br. at 7). Similarly, section 115-4 of the Thornbury Code states: "The Board shall have jurisdiction and control of all subdivision and land development within township limits." The actions of the Board in this case fall squarely within its jurisdiction. The Board is "a body with final policy making authority" for purposes of § 1983 liability.

iv. Qualified Immunity

"Government officials performing discretionary functions generally are shielded from liability for civil damages." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This "qualified immunity" applies so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* The individual defendants assert that they are entitled to qualified immunity from suit with respect to their determination that plaintiff's amended plan constituted a "sketch" plan. Once again, in my view defendants distinction between its decision to reject plaintiff's rezoning request and its treatment of plaintiff's alternative plan is inappropriate in this case. While I am mindful of the admonition of the Court of Appeals that "there is a compelling need [to protect legislative bodies from] the severe chilling effect numerous suits for damages would have on prospective officials," *Acierno,* 40 F.3d at 615 (citations omitted), I disagree with the individual defendants' contention that they are entitled to qualified immunity for their actions.

In considering a claim of qualified immunity I must determine: (1) whether the actions of the Board violated a constitutional right; and if so, (2) whether the right was clearly established at the time plaintiff alleges the violation occurred. *See Saucier v. Katz,* 121 S. Ct. 2151, 2155-56 (2001). With respect to the first prong, plaintiff asserts a violation of its substantive due process rights. In order to succeed with this claim plaintiff must demonstrate that it was deprived of a protected property interest by a government official or body, and that those actions were either: (1) not rationally related to a legitimate governmental interest; or (2) motivated by bias, bad faith, or improper

motives. *See Parkway Garage v. City of Philadelphia,* 5 F.3d 685, 692 (3d Cir. 1993).

Defendants do not dispute that they acted as government officials and I have already determined that their actions affected a fundamental property interest of plaintiff. *See supra* at 8 § A. I have also found that there is sufficient evidence as a matter of law to support plaintiff's claim of an improper motive attributable to defendants acting as an entire body. *See supra* at 16 § C; *see also United Artists Theatre Circuit, Inc. v. The Township of Warrington,* No. Civ. A. 98-5556, 2001 WL 936638 at (*5 E.D. Pa. Aug. 15, 2001) ("plaintiff has provided evidence permitting a factfinder to conclude the Board intentionally delayed approval of plaintiff's project because it wished to receive the impact fee offered by [another developer]. If proved, the court believes the monetary motivation of the Board was improper and would constitute a violation of substantive due process.").

In *United Artists,* since the individual defendant Board members were, as here, represented by the same counsel and referred to themselves as a group the Court found it appropriate to address qualified immunity of the Board as a whole. 2001 WL 936638 at *3. However, while the Court of Appeals held that the district court Court [sic] had properly analyzed the Board members' request for qualified immunity on summary judgment, the Court remanded the case for further analysis under *Grant v. City of Pittsburgh,* 98 F.3d 116, 122 (3d Cir. 1996). In *Grant,* the Court was asked to evaluate a claim of qualified immunity raised by members of a city council. The Court stated that "crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the district court) to establish, for purposes of summary

judgment, a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff)." 98 F.3d at 122. Under *Grant* the right the Board is alleged to have violated must not only be clearly established, but there must also be support in the record of specific official actions alleged to have violated the right. *Id.* With respect to the actions of each of the individual Board members plaintiff points to the following evidence in support [sic] his contention that they violated his substantive due process rights:

1. Defendant Wilson: Wrote a memo to the Township Manager in which he stated his desire that Waters be assured that its supermarket would be the next one built in order that the township would be able to use the money promised by Waters. This memo also stated that Wilson would not vote for any additional commercial property for Thornbury Noble so it would not be "likely to get Genaurdi as a lead tenant." Stated to Waters at a township meeting that the Board would "really have to believe that there would be a true benefit to the township for a trade off to allow this to be rezoned." Present at a June 17, 1997 meeting when Waters was informed of an absolute minimum tradeoff in return for rezoning. Present at the July 7, 1998 meeting when defendant Schmidt asked plaintiff if it was interested in making a "voluntary contribution." Present at the meetings granting Waters' requested rezoning, denying plaintiff's, and determining plaintiff's alternative plan was to be considered "new" rather than amended. Discussed the fate of Thornbury Noble's application with representatives of Genaurdi's.

2. Defendant MacDonnell: In July 1998, told a representative of Genaurdi's that plaintiff's rezoning request would be denied. Took part in discussions at a meeting concerning the Board's initial "unreceptive" response to the Waters proposal and the absolute minimum tradeoff it would take Waters to get its requested re-zoning. Was present at the meeting when a request for a contribution from Thornbury Noble was made. Advised plaintiff that such contributions had been made "voluntarily" in the past when plaintiff's representative stated that it would consider any contribution required by ordinance. Present at the meeting where Waters' request to rezone was granted and plaintiff's was denied.

3. Defendant Schmidt: Present at the initial meetings with Waters and stated that "the only way he would have any interest in [the Waters project] is for the Township to acquire a similar piece of property for open space." Was present at the meeting with Waters discussing the absolute minimum tradeoff it would take for Waters to get its requested rezoning. Asked plaintiff if it would be willing to "help[] the township with open space to compensate for loss of residential housing." Present at the meeting where Waters' request to re-zone was granted and plaintiff's was denied.

4. Defendant Lang: Present at initial meetings with Waters. Present at the meeting denying plaintiff's request to rezone. Told plaintiff's representative that its re-zoning request would not be granted unless plaintiff could convince the township there is a compelling benefit to do so. Present at the meeting

where the Board voted unanimously that plaintiff's amended plan was in fact a new plan.

5. Defendant Dewy: Present at the initial meetings with Waters including that discussing the absolute minimum tradeoff it would take Waters to get its requested re-zoning. Informed the Board what the Park & Recreation Committee had told Waters would be required as a trade off for the open space that would be consumed by the Waters project. Was present at the meeting when a request for a contribution from Thornbury Noble was made. Was present at the meeting where Waters' request to re-zone was granted and plaintiffs was denied. Present at the meeting where the Board voted unanimously that plaintiff's amended plan was in fact a new plan.

While it is my belief that defendants' claim of qualified immunity is better understood as one claimed by the Board as a whole, reviewing the record I hold that plaintiff has provided sufficient evidence of the involvement of each of the individual defendants to establish a violation of its constitutional rights under *Grant*.

The second prong of the qualified immunity analysis, requiring that the constitutional right be clearly established at the time of the alleged violation, ensures that government officials are not held liable for actions they could not reasonably have known were unlawful. *Saucier*, 121 S. Ct. at 1256-1257. At the time of the of the [sic] violation "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Andersen v. Creighton*, 483

U.S. 635, 636-37 (1987). Here plaintiff alleges that the Board intentionally obstructed the approval of its development plan in order to secure funds offered by another developer. The time of the alleged violation was at the earliest July 7, 1998; the date of the meeting at which plaintiff was asked to make a voluntary contribution to compensate for the loss of residential zoning. In *Blanche Road Corp.,* [sic] F.3d at 268 (3d Cir. 1995), plaintiff accused town officials of deliberately delaying the process by which the township issued zoning permits for reasons unrelated to the merits of the applications. The *Blanche Road* Court stated: "[i]f defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the . . . project, . . . such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity." Similarly in *Bello,* 840 F.2d at 1129 (3d Cir. 1988), the Court held that the denial of a building permit designed to hinder plaintiff's building project due to personal animosity toward one of plaintiff's employees constituted a substantive due process violation. In the case before me, plaintiff alleges that defendants were motivated by a desire to secure land for the Township. In *Parkway Garage,* 5 F.3d at 695 (3d Cir. 1993), the Court held that city officials who deprived plaintiff of a fundamental property right because they wished to increase the value of the city's property violated plaintiff's substantive due process rights.

In my view the right defendants are alleged to have violated was clearly established at the time of their actions. The members of the Board should have been aware that their alleged actions were unconstitutional and they are therefore not entitled to the defense of qualified immunity. *See United Artists Theatre Circuit,* 2001 WL

936638 at *8 (holding that defendant Board of Supervisor members were not entitled to qualified immunity for decisions made in 1995, where they allegedly had impeded the final approval of a movie theater project so that the township could receive a fee from a competing developer.).

II. Intentional Interference With Prospective Contractual Relations

Also before me is the individual defendants motion for summary judgment on Count IV, which alleges that they interfered with prospective contractual relationships between Thornbury Noble and Genaurdi's and SuperFresh supermarkets. The elements of a cause of action for intentional interference with a contractual relation, whether existing or prospective, are: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. *See Strickland v. University of Scranton*, 700 A.2d 979, 985 (Pa. Super. Ct. 1997).

Relying on *Lindner v. Mollan*, 544 Pa. 487, 677 A.2d 1194 (Pa. 1996), the individual supervisors move for summary judgment on the grounds that since the actions alleged by plaintiff were taken in the course of their official duties they are entitled to absolute immunity as high public officials. *See Jonnet v. Bodick*, 431 Pa. 59, 244 A.2d 751, 753 (Pa. 1968) (holding that members of township boards of supervisors are considered "high public officials" under state law for purposes of absolute immunity). The

Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541, *et seq.*, contains various immunity provisions for municipalities and their officials. However, 42 Pa. C.S.A. § 8550 provides that there is no immunity for officials that cause injury through "a crime, actual fraud, actual malice or willful misconduct." In my prior opinion denying defendants' motion to dismiss I cited *Delate v. Kolte,* 667 A.2d 1218 (Pa. Commw. Ct. 1995), stating:

> In *Delate* . . . , the court applied that provision to a case arising from a zoning dispute and held that "the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful conduct which is necessary for a finding of willful misconduct [within the meaning of § 8550]." However, the court went on to note that in this context "willful misconduct" is synonymous with the term "intentional tort." *Id.* Therefore, individual zoning board members could be held liable if they "intentionally reached the wrong decision knowing that it was wrong, acted from corrupt motives, or engaged in any other type of conduct which would demonstrate willful misconduct." *Id.* I therefore hold that if it were confronted with the issue the Pennsylvania Supreme Court would find that the intentional interference with contractual relations alleged here constituted willful misconduct within the meaning of § 8550 and *Delate.*

Thornbury Noble, 2000 WL 1358483 at *4.

Individual Defendants appear to contend that since the *Lindner* Court held that "section 8550 of the PSTCA does not abrogate the common law doctrine of absolute privilege afforded high public officials . . ." they are absolutely immune from intentional tort claims arising out of

activity that occurred while performing their official duties. However, the *Lindner* Court's decision concerned exemption for high public officials from law suits for defamation. As the court in *Smith v. School District of Philadelphia,* 112 F. Supp. 2d 417, 426 (E.D. Pa. 2000), noted, "the Supreme Court of Pennsylvania . . . has yet to decide whether the immunity for high public officials extends to other intentional torts." Plaintiff states that the *Smith* Court then predicted that "the Supreme Court of Pennsylvania would hold that the Tort Claims Act does abrogate high public official immunity for suits for intentional infliction of emotional distress and invasion of privacy. *Id.* at 424." (Pl.'s Resp. to Ind. Def.'s at 29). This is incorrect. First, this discussion takes place on page on page [sic] 426 rather than page 424. More importantly, however, the *Smith* Court reached the opposite conclusion than that attributed to it by plaintiff. The *Smith* Court stated: "This Court predicts that the Supreme Court of Pennsylvania would hold that the Tort Claims Act does *not* abrogate high public official's absolute immunity from civil suits for intentional infliction of emotional distress and invasion of privacy." 112 F. Supp. 2d at 426 (emphasis added). The *Smith* Court based this determination on the *Lindner* Court's explanation that the Pennsylvania common law doctrine of absolute immunity for high public officials "rests upon the idea that conduct which would otherwise be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *See Smith,* 112 F. Supp. 2d at 426 (quoting *Lindner,* 677 A.2d at 1195). High public officials, as opposed to ordinary local agency employees, "accused of defamation enjoy absolute immunity even when willful

misconduct is alleged." *Smith,* 112 F. Supp. 2d at 425. The *Smith* Court also found persuasive the *Lindner* Court's statement that "this sweeping immunity is not for the benefit of high public officials but for the benefit of the public." *Id.* As the *Smith* plaintiff's complaint alleged that the actions taken by defendants all occurred within the course of their official duties, the court held they were entitled to invoke the doctrine of absolute immunity for high public officials as a defense to plaintiff's intentional tort claims.

Plaintiff contends that the actions of the Board were outside the scope of their duties as township supervisors. According to plaintiff "[t]he Supervisors actions in interfering with the prospective contractual relations of Thornbury Noble are not within the duties prescribed by statute." (Pl.'s Resp. to Ind. Def. at 30). I agree that there is nothing in the Board members' statutory job descriptions authorizing them to commit the specific tort they are alleged to have committed; however that is not the question before me. Much of the evidence of misconduct cited by plaintiff involved casting votes, making statements, or merely being present at Board meetings. Such activity was clearly undertaken in the individual defendants' official capacities. Plaintiff points to the conversations of particular Board members with representatives of Genaurdi's advising them that the Board would not be voting for any additional property to be re-zoned at Thornbury Commons, as examples of activity undertaken outside the scope of the official duties of individual defendants. I disagree.

Simply because there is nothing in the statute defining their duties that states that supervisors are permitted to communicate to interested parties how they believe the

Board will vote does not mean that if any such communication occurs it must have taken place outside the scope of their official duties. Indeed, the subject of these conversations (how they intended to vote) concerned activity in their official capacity. Further, as I previously noted, plaintiff itself states: "Thornbury Noble's claims against the Township and the individuals in their official capacity are premised upon the misconduct of the Supervisors *acting in their official capacity*. . . ." (Pl.'s Resp. to Ind. Def's at 14-15) (emphasis added). Because such activity took place while the individual defendants were acting in furtherance of their duties as township supervisors it is "entitled to protection even at the expense of uncompensated harm to the plaintiff. . . ." *Lindner,* 677 A.2d at 1195. Construing the facts in the light most favorable to plaintiff, they do not show that the individual defendants acted for their own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than their official one.

My review of Pennsylvania law reveals no Supreme Court precedent on whether "high public officials" are entitled to absolute immunity from civil suits for intentional interference with prospective contractual relations. In order to predict how the Supreme Court of Pennsylvania would resolve this question of unsettled state law, I should consider "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *Markel v. McIndoe,* 59 F.3d 463, 473 n. 11 (3d Cir. 1995). While I am mindful that my prior opinion denying defendants' motion to dismiss stated my belief that defendants could be held liable for wilful misconduct, I find the *Smith*

Court's application of the rationale employed by the Court in *Lindner* persuasive.[15] Applying that rationale to the case before me I believe that the Supreme Court of Pennsylvania would hold that absolute immunity protects high officials from civil suits for intentional interference with prospective contractual relations. Accordingly, Count IV of plaintiff's complaint will be dismissed against the individual defendants.

III. Immediate Appealability

A district court may certify an order for an interlocutory appeal if it is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The trial court has discretion whether to certify, however, certification is appropriate only in "exceptional" circumstances. *See Piazza v. Major League Baseball,* 836 F. Supp. 269, 270 (E.D. Pa. 1993). The Court of Appeals has held that before an order can be certified for interlocutory appeal, all three factors identified in 28 U.S.C.A. § 1292(b) must be satisfied. *See Katz v. Carte Blanche Corp.,* 496 F.2d 747, 754 (3d Cir. 1974) (finding that "the district judge must certify that the order satisfies the three criteria").

With respect to the issues in the case before me, in my view there are two controlling issues of law over which there are substantial grounds for differences of opinion: (1)

[15] I note that neither *Smith* nor *Lindner* were cited in any submission to this court prior to individual defendants' motion for summary judgment.

whether the plaintiff's allegations constitute a violation of its substantive due process rights, and (2) whether individual defendants are entitled to absolute immunity as high public officials from plaintiff's claim of prospective interference with contractual relations. *See Katz,* 496 F.2d at 755 (holding that a controlling issue of law is one that "would result in a reversal of a judgment after final hearing"). In light of my prior Orders of September 20, 2000, dismissing Count III of plaintiff's complaint in its entirety and Count IV as to municipal defendants, and November 9, 2000, dismissing Count II in its entirety, the two issues discussed above concern plaintiff's only remaining claims. I hold that an immediate appeal would materially advance the ultimate termination of this litigation and therefore the parties will be granted leave to seek an appeal pursuant to 28 U.S.C. § 1292(b).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, et al.	:	NO. 99-6460

ORDER

AND NOW, this 19 day of March, 2002, for the reasons set forth in the accompanying memorandum, it is ORDERED:

1. Plaintiff Thornbury Noble's § 1983 claims against individual defendants in their official capacities are DISMISSED.

2. Defendants Thornbury Township and Thornbury Township Board of Supervisors' motion for summary judgment is DENIED.

3. Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell's motion for summary judgment is DENIED in part and GRANTED in part.

    a. Individual defendants' motion for summary judgment on Count 1 of plaintiff's complaint is DENIED.

    b. Individual defendants' motion for summary judgment on Count IV of plaintiff's complaint is GRANTED.

4. Judgment is entered in favor of defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell and against plaintiff

Thornbury Noble as to Count IV of plaintiff's complaint.

5. As this Order involves controlling issues of law as to which there are substantial grounds for differences of opinion and an immediate appeal from them may materially advance the ultimate termination of this litigation, I hereby certify this Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

/s/ TN O'Neill
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their personal capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL	:	NO. 99-6460

CIVIL JUDGMENT

Before: Honorable Thomas N. O'Neill, Jr.

AND NOW, this 21 day of October, 2003, in accordance with the Court's Memorandum and Order, dated October 21, 2003,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendants, Thornbury Township, Chester County; Thornbury Township Board of Supervisors; Patricia A. Dewey; J. Christopher Lang; William A. Schmidt, Jr.; Charles A.W. Wilson; and Robert A. MacDonnell; and against plaintiff, Thornbury Noble, Ltd.

BY THE COURT:

/s/ Tom O'Neill

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
	:	
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their personal capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL	:	NO. 99-6460
O'NEILL, J.		OCTOBER 21, 2003

MEMORANDUM

Plaintiff filed the present complaint in December 1999 against Thornbury Township, its Board of Supervisors and the individual members of the Board: Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles A.W. Wilson and Robert A. MacDonnell. After several decisions there remains only one claim pending. Plaintiff alleges that defendants violated plaintiff's substantive due process rights under the Fourteenth Amendment to the United States Constitution and states its cause of action under 42 U.S.C. § 1983. This claim is made against all of the defendants: Thornbury Township, the Board and the members of the Board in their personal capacities

In a decision filed March 20, 2002, I denied defendants' motions for summary judgment on the substantive due process claim. Defendants have renewed their motions for summary judgment in light of a recent decision by the

Court of Appeals, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). *United Artists* changed the standard of proof necessary to succeed on a substantive due process claim and therefore I will reconsider defendants' motions for summary judgment. Plaintiff has filed a brief in opposition to defendants' renewed motions.

BACKGROUND

This case stems from a land use decision by a municipal Board of Supervisors. A detailed factual background of this dispute is given in my earlier decision – *Thornbury Noble, Ltd. v. Thornbury Township et al.*, 2002 U.S. Dist. LEXIS 4698, at *2-8 (E.D. Pa. March 20, 2002). I will briefly summarize the relevant facts.

Plaintiff owns property situated at the intersection of routes 202 and 926 in Thornbury Township, Chester County, Pennsylvania. In 1997 plaintiff changed its development plan from one for an L-shaped building with multiple stores to a plan for a box shaped building housing one large supermarket. The box shaped building could have been built on the land then zoned for business, but access to the supermarket would have been improved if the building were moved partially onto two acres of adjacent land that were then zoned residential.

From 1997 through 1999 plaintiff attempted to convince the township Board of Supervisors and the county Planning Commission to make the zoning changes necessary to allow a box shaped supermarket with good access. Plans for Genuardi's and Superfresh supermarkets fell through while plaintiff fought for a zoning change. Meanwhile, another developer, R.J. Waters & Associates, applied for and

received the zoning changes necessary to build a supermarket at another site in the township.

Plaintiff claims that defendants intentionally approved the zoning for Waters' development more quickly than they approved the zoning for plaintiff's development because Waters agreed to make a $600,000 contribution to the township for the purchase of open space. Plaintiff alleges that defendants knew that only one supermarket would be built in the township and that it would go to the first developer to get zoning approval. The histories of both developers' applications for rezoning are detailed below.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party, to prevail, must make a showing sufficient to establish the existence of every element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. The nonmoving party may not simply rest

upon the allegations or denials of the party's pleading. *See id.* at 324.

On the pending motions I must determine whether any genuine issue of material fact exists. An issue is "material" only if the factual dispute "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249-50 (citations omitted).

DISCUSSION

Defendants move for summary judgment based on a qualified immunity defense. In consideration of this defense I must ask: (1) has plaintiff successfully alleged a deprivation of a constitutional right; and (2) was that right clearly established at the time of the deprivation. *Lewis*, 523 U.S. at 841-42 n.5. If I answer "no" to either of these questions defendants are entitled to qualified immunity and I will grant their motions for summary judgement. *Id.* Therefore, the first issue I will discuss is whether plaintiff has alleged sufficiently a deprivation of its substantive due process rights. I answer that question in the negative. Accordingly, I do not reach the issue of whether the constitutional right was established clearly at the time of the deprivation.

Because plaintiff alleges a violation of his substantive due process rights by state actors it states a cause of action under 42 U.S.C. § 1983.[1] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Plaintiff claims that Thornbury Township and its Board of Supervisors violated its substantive due process rights. An executive action[2] violates a person's substantive due process rights if the plaintiff can prove that: (1) that he held an interest protected by the Fourteenth Amendment's due process clause; and (2) the government's deprivation of that interest "shocks-the-conscience". *Levin v. Upper Makefield Township*, 2003 U.S. Dist. LEXIS 3213, at *15-16 (E.D. Pa. Feb. 27, 2003), summarizing law from *County of Sacramento v. Lewis*, 523 U.S. 833, 846-50 (1998) and *United Artists*, 316 F.3d at 399-401.

I have already held that plaintiff possessed a property right that is protected by the substantive due process clause of the Fourteenth Amendment and that the issue before me is ripe for adjudication. *Thornbury Noble*, 2002 U.S. Dist. LEXIS 4698, at *13-18 (property right) and *18-26 (ripeness). I must decide upon these renewed motions for summary judgment whether there is a genuine issue of

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[1] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."

[2] The standard for whether an action violates a person's due process rights is different for an executive action than it is for a legislative action. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), contrasting *Griswold v. Conn.*, 381 U.S. 479 (1965) (legislative action) with *Rochin v. Cal.*, 342 U.S. 165 (1952) (executive action).

material fact regarding whether the alleged misconduct by defendants shocks the conscience.

I. The Standard

In *United Artists* the Court of Appeals held that the shocks the conscience standard as explained in *Lewis* is to apply to land use claims made under the substantive due process clause of the Fourteenth Amendment. *United Artists*, 316 F.3d at 401. Therefore I will look directly to the Supreme Court's decision in *Lewis* for the definition of the standard.

The *Lewis* decision reviews the Supreme Court's descriptions of the shocks the conscience standard through the years. The first case to use the standard found a violation of substantive due process by executive action that "shocks the conscience" and violates the "decencies of civilized conduct." *Rochin v. California*, 342 U.S. 165, 172-73 (1952). In a later case the Court described conscience shocking action as that which is "so 'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play and decency." *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957). It has also been described as action that "interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987).

Shocks the conscience is not a precise standard. *Lewis*, 523 U.S. at 847 ("[T]he measure of what is conscience shocking is no calibrated yard stick."). It must be applied to each case independently and action that "shocks in one environment may not be so patently egregious in another." *Id.* at 850.

One of the reasons that the Court of Appeals held that the shocks the conscience standard applies in land use cases is that the Court does not want judges acting as a "zoning Board of appeals." *United Artists v. Warrington*, 316 F. Supp. at 402. Every developer who challenges an unfavorable land use Planning decision does so on the basis of local abuse of legal authority, but these are state law claims that cannot be made into section 1983 claims by the developer's use of the term "due process." *Id.*, citing *Creative Environments, Inc. v. Eastabrook*, 680 F.2d 822 (1st Cir. 1982). The Court of Appeals for the First Circuit, which the Court of Appeals cited favorably in *United Artists*, 316 F. Supp. at 402, has declared that:

> the conventional Planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus, or the like – which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were Planning officials to clearly violate, much less "distort" the state scheme under which they operate.

Eastabrook, 680 F.2d at 833, quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 (1974).

In my March 2002 decision I analyzed the evidence available on the motion to dismiss as follows:

> plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did

> so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Thornbury Noble, 2002 U.S. Dist. LEXIS 4698, at *27-28. At this time I made those statements, however, it was my understanding that plaintiff could prove its case by showing improper motive. In light of the Court of Appeals' decision in *United Artists*, however, the question before me now is whether there is sufficient evidence as a matter of law to support plaintiff's claim that defendants' actions shock the conscience.

II. The Evidence

As early as 1988, when plaintiff applied to rezone 5 acres from residential to commercial, residents of Thornbury Township voiced concerns about what would be built on plaintiff's land. Defs.' Mot. for Summ. J., ex. 4 ("They were complaining about the contamination, what they would see outside of their windows, drainage problems and many other concerns voices throughout this period."). Despite these objections the 1988 request for rezoning was granted. *Id.*, ex. 5.

Plaintiff initiated its next request for rezoning in 1997 when it was working with Genuardi's to build a supermarket on the land. *Id* ., ex.11. The rezoning was required to allow good access to a box shaped building, which is the shape of building most suited to supermarkets. At the January 20, 1998 Board of Supervisors meeting several residents objected to any rezoning. Pls.' Br. in Opp. to

Defs.' Mots. for Summ. J., ex. 4. In response to the concerns of neighbors plaintiff bought a residential property to act as a buffer between the development and residents. *Id.*, ex. 15. After plaintiff announced its purchase of the buffer property the residents present at the July 7, 1998 meeting of the Board of Supervisors expressed their preference for a supermarket over a strip mall, even if the supermarket required rezoning. *Id.*

During its consideration of the rezoning request the Board of Supervisors asked if plaintiff had "any interest in helping the township with open space to compensate for loss of residential zoning." *Id.*, ex. 15. Plaintiff's representative at the meeting replied that if there were an ordinance asking for such a contribution then plaintiff would consider making one. *Id.* The Board replied that "contributions to the Township have been made voluntarily. [Plaintiff] is asking this Board to intensify the use of the property and this Board deserves additional open space to compensate for the loss to the Township." *Id.* After that exchange the Board moved on to another topic of discussion.

At the meeting on August 4, 1998 the Board informed plaintiff that it did not favor rezoning plaintiff's property. The minutes reflect that the Board members enumerated their reasons for not favoring rezoning. The minutes list the concerns as:

- Not convinced that a single large building has an advantage over any other commercial project.
- The parcel is large enough for success, it does not have to be expanded for a viable project.

- Must be convinced that the proposal could justify commercial expansion.
- There is a plan and that is what should stand.
- The Township should not make any changes unless there is some compelling reason.
- Pursue offices for the site.

Defs.' Mot. for Summ. J., ex. 17. The Board also stated that it was "sympathetic to the residents[']' concerns." *Id.*

At the October 14, 1998 plaintiff appeared before the county Planning Commission to present two plans for its proposed development – one that did not require rezoning and one that did require rezoning. *Id.*, ex. 25. The Commission spent 75 minutes discussing the potential impact of the proposed rezoning and development. *Id.* The Commissioners asked questions about how plaintiff would prevent "commercial creep" along Route 926 and what assurances plaintiff could give that the proposed increase in impervious surface would not cause flooding problems. *Id.* Plaintiff represented that it had acquired a parcel of land that would remain zoned residential and prevent the commercial district from running further east along Route 926. *Id.* It also promised to build a detaining basin to control storm waters. *Id.* The Commission was not happy with either plan presented and suggested that plaintiff try to combining elements of the two plans into a new one that would use the land in compliance with current zoning. *Id.*

When plaintiff came back to the Board of Supervisors on November 3, 1998 it had a new development plan that incorporated some of the suggestions made at the Planning Commission meeting; however it still required

rezoning. *Id.*, ex. 26. The minutes reflect that the Board wanted to see a compelling benefit to the township before it would approve the change in zoning. *Id.* The Board noted that plaintiff's development site had already gong from 4 to 11 acres zoned commercial and that the 2 acres plaintiff was now requested to be zoned commercial was bought to provide a buffer of undeveloped space between the development and residential areas. *Id.* The minutes reflect that the Board informed plaintiff it was "not in favor of rezoning the property." *Id.*

The Planning Commission recommended in late 1998 that the Board of Supervisors rezone plaintiff's land and require additional landscaping. Pls.' Br. in Opp. to Defs.' Mots. for Summ. J., ex. 20. The Board of Supervisors never approved plaintiff's request for rezoning.

The following evidence establishes the process for rezoning of the land needed for Waters' development plan. The minutes of the May 6, 1997 Board of Supervisors meeting reported that the Board expressed reluctance to approve the rezoning required for Waters' plan. Pl.'s Br. in Opp. to Defs.' Mot. for Summ. J., ex. 9 ("The message is that the Board is not a particularly receptive audience."). The minutes also reflect that the Board told Waters that it would be more receptive to the plan if Waters gave the township open land in return. *Id.* (A Board member said "he did not see a need for another shopping center in the township and that the only way he would have any interest [in Water's plan] is for the township to acquire a similar piece of property for open space. . . ." Another said that "the Supervisors have to really believe there would be a true benefit to the township for a trade off to allow this to be rezoned.").

Waters went before the township's Parks & Recreation Committee and requested suggestions to "make the zoning change more favorable for the township." *Id.*, ex.10. The Committee recommended the purchase of 30 acres of a certain tract, which would be restored and used by the township as open space. *Id.*, ex. 11. Waters, "in lieu of saving the existing structures on the Property, and in the interest of assisting the Township in its open space acquisition efforts" offered "to make a contribution to the Township should [Waters'] zoning and land development proposals be approved, in order to assist [the Township] in the acquisition of additional Township open space." *Id.*, ex. 12 at p. 7.

The Board's decision to grant Waters' request for rezoning and land development approval notes that the project "will have a substantial impact upon the existing open space" because "[a]lmost 20 acres . . . will be hereafter lost to the Township as potentially available for open space purposes." *Id.* at p. 14. The decision acknowledges Waters' offer to give the township money towards the township's purchase of additional open space and states that "[w]e believe that this acquisition will more than offset the loss of open space and historical amenities on the Property and will provide a significant piece of open space which can be enjoyed by Township residents for generations to come." *Id.* The Order that granted Waters its zoning relief was subject to a number of "express conditions" including one that Waters was to contribute to the township $600,000 "for the express purpose of purchasing additional open space. . . ." *Id.* at 16, 21.

The Board of Supervisors approved the zoning changes requested by Waters even though the Planning Commission had recommended against their approval. By

letter of August 4, 1998 the Planning Commission "recommend[ed] that the zoning map change and zoning ordinance change not be approved because they are inconsistent with the land use policies adopted in the Township Comprehensive Plan and because of the significant affects that the proposed use would have on the local road network." *Id.*, ex. 27. The Board of Supervisors addressed these concerns in its decision to grant the changes and respectfully disagreed with the Planning Commission. *Id.*, ex. 12, p. 10. The Board found that the changes were consistent with both county and township development plans and that the Waters property was well situated for commercial development. *Id.*

In addition to the evidence regarding each development separately there is evidence that the Board favored the Waters' project over plaintiff's proposed development. In an e-mail to the solicitor and township manager the chairman of the Board said "[o]ne key issue is not having [several zoning issues] slow down the Waters' project since we want them to be able to lay the first brick to assure their supermarket will be the next one build to enable our funding for the next phase of the Dallet tract acquisition effort." *Id.*, ex. 14. The Board knew that plaintiff wanted to build a supermarket in the township. At least one Board member was of the opinion that only one supermarket would be built and that the first developer to get township approval would get the supermarket. *Id.*, ex. 28 (deposition of Charles Wilson, chairman of Board of Supervisors).

III. Analysis

A reasonable jury could conclude from this evidence that defendants intentionally hastened approval of the

Waters' project and/or intentionally slowed down approval of plaintiff's plan. The Board was not motivated by personal gain, however, but rather by a concern for the amount of open space in the township. I need not consider whether the Board acted with an improper motive. I need only decide whether their actions shock the conscience.

The executive action here is a township and its Board of Supervisors favoring one development over another for the purpose of preserving open space in the township.[3] This action was taken in the environment of local land use planning, an environment that involves many competing concerns and a good deal of politics. Plaintiff sought a zoning change for business, rather than for personal purposes. Even without the zoning changes requested Plaintiff could and in fact did build a shopping center.

I hold as a matter of law that in the land use environment and on these specific facts a township and its Board of Supervisors favoring one development over another for the purpose of preserving open space in the township does not shock the conscience. It does not "violate the decencies of civilized conduct." *See Rochin*, 342 U.S. at 172-73. It is not "so 'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play an decency." *See Breithaupt*, 352 U.S. at 435. It does not "interfere[] with rights 'implicit in the concept of ordered liberty.'" *See Salerno*, 481 U.S. at 746.

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[3] I make no finding regarding whether defendants did intentionally hasten the approval of Waters' project or intentionally slow the approval of plaintiff's development. I consider this situation for the purpose sole of deciding defendants' motions for summary judgment.

That defendant's actions shock the conscience is an essential element of a cause of action under Section 1983 for violation of a party's substantive due process rights. The evidence presented in this case, viewed in the light most favorable to plaintiff, does not create a genuine issue of material fact regarding whether defendants violated plaintiff's constitutional rights. Accordingly, defendants are entitled to qualified immunity and judgment as a matter of law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.	:	CIVIL ACTION
v.	:	
THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their personal capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL	:	NO. 99-6460

ORDER

AND NOW, this 21 day of October, 2003, after consideration of defendants' motions for summary judgment and plaintiff's responses thereto, and for the reasons set forth in the accompanying memorandum, the defendants' motions for summary judgment are GRANTED.

/s/ T. N. O'Neill
THOMAS N. O'NEILL, JR., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4476

THORNBURY NOBLE, LTD.

appellant

v.

THORNBURY TOWNSHIP, ET AL.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
99-6460
District Judge: Honorable Thomas N. O'Neill

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER and VAN ANTWERPEN, *Circuit Judges*

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: November 19, 2004

CH/cc: Craig A. Styer, Esq.
Mary A. Rossi, Esq.
Walter F. Kawalec III, Esq.
Andrew J. Bellwoar, Esq.

53 Pa. Stat. Ann.

§ 10101. Short title

This act shall be known and may be cited as the "Pennsylvania Municipalities Planning Code."

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§ 10501. Grant of power

The governing body of each municipality may regulate subdivisions and land development within the municipality by enacting a subdivision and land development ordinance. The ordinance shall require that all subdivision and land development plats of land situated within the municipality shall be submitted for approval to the governing body or, in lieu thereof, to a planning agency designated in the ordinance for this purpose, in which case any planning agency action shall be considered as action of the governing body. All powers granted herein to the governing body or the planning agency shall be exercised in accordance with the provisions of the subdivision and land development ordinance. In the case of any development governed by planned residential development provisions adopted pursuant to Article VII,[1] however, the applicable provisions of the subdivision and land development ordinance shall be as modified by such provisions and the procedures which shall be followed in the approval of any plat, and the rights and duties of the parties thereto shall be governed by Article VII and the provisions adopted thereunder. Provisions regulating mobilehome parks shall be set forth in separate and distinct articles of any subdivision and land development ordinance adopted pursuant to Article V[2] or any planned residential development provisions adopted pursuant to Article VII.

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[1] 53 P.S. § 10701 et seq.

[2] 53 P.S. § 10501 et seq.

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§ 10503. Contents of subdivision and land development ordinance

The subdivision and land development ordinance may include, but need not be limited to:

(1) Provisions for the submittal and processing of plats, including the charging of review fees, and specifications for such plats, including certification as to the accuracy of plats and provisions for preliminary and final approval and for processing of final approval by stages or sections of development. Such plats and surveys shall be prepared in accordance with the act of May 23, 1945 (P.L. 913, No. 367),[1] known as the "Engineer, Land Surveyor and Geologist Registration Law," except that this requirement shall not preclude the preparation of a plat in accordance with the act of January 24, 1966 (1965 P.L. 1527, No. 535),[2] known as the "Landscape Architects' Registration Law," when it is appropriate to prepare the plat using professional services as set forth in the definition of the "practice of landscape architecture" under section 2[3] of that act. Review fees may include reasonable and necessary charges by the municipality's professional consultants or engineer for review and report thereon to the municipality. Such review fees shall be based upon a schedule established by ordinance or resolution. Such review fees shall be reasonable and in accordance with the ordinary and customary charges by the municipal engineer or consultant for similar service in the community, but in no event shall the fees exceed the rate or cost charged by the engineer or consultant

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[1] 63 P.S. § 148 et seq.

[2] 63 P.S. § 901 et seq.

[3] 63 P.S. § 902.

to the municipalities when fees are not reimbursed or otherwise imposed on applicants.

(i) In the event the applicant disputes the amount of any such review fees, the applicant shall, within ten days of the billing date, notify the municipality that such fees are disputed, in which case the municipality shall not delay or disapprove a subdivision or land development application due to the applicant's request over disputed fees.

(ii) In the event that the municipality and the applicant cannot agree on the amount of review fees which are reasonable and necessary, then the applicant and the municipality shall follow the procedure for dispute resolution set forth in section 510(g),[4] provided that the professionals resolving such dispute shall be of the same profession or discipline as the consultants whose fees are being disputed.

(1.1) Provisions for the exclusion of certain land development from the definition of land development contained in section 107[5] only when such land development involves:

(i) the conversion of an existing single-family detached dwelling or single family semi-detached dwelling into not more than three residential units, unless such units are intended to be a condominium;

(ii) the addition of an accessory building, including farm buildings, on a lot or lots subordinate to an existing principal building; or

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[4] 53 P.S. § 10510(g).

[5] 53 P.S. § 107.

(iii) the addition or conversion of buildings or rides within the confines of an enterprise which would be considered an amusement park. For purposes of this subclause, an amusement park is defined as a tract or area used principally as a location for permanent amusement structures or rides. This exclusion shall not apply to newly acquired acreage by an amusement park until initial plans for the expanded area have been approved by proper authorities.

(2) Provisions for insuring that:

(i) the layout or arrangement of the subdivision or land development shall conform to the comprehensive plan and to any regulations or maps adopted in furtherance thereof;

(ii) streets in and bordering a subdivision or land development shall be coordinated, and be of such widths and grades and in such locations as deemed necessary to accommodate prospective traffic, and facilitate fire protection;

(iii) adequate easements or rights-of-way shall be provided for drainage and utilities;

(iv) reservations if any by the developer of any area designed for use as public grounds shall be suitable size and location for their designated uses; and (v) land which is subject to flooding, subsidence or underground fires either shall be made safe for the purpose for which such land is proposed to be used, or that such land shall be set aside for uses which shall not endanger life or property or further aggravate or increase the existing menace.

(3) Provisions governing the standards by which streets shall be designed, graded and improved, and walkways, curbs, gutters, street lights, fire hydrants,

water and sewage facilities and other improvements shall be installed as a condition precedent to final approval of plats in accordance with the requirements of section 509.[6] The standards shall insure that the streets be improved to such a condition that the streets are passable for vehicles which are intended to use that street: Provided, however, That no municipality shall be required to accept such streets for public dedication until the streets meet such additional standards and specifications as the municipality may require for public dedication.

(4) Provisions which take into account phased land development not intended for the immediate erection of buildings where streets, curbs, gutters, street lights, fire hydrants, water and sewage facilities and other improvements may not be possible to install as a condition precedent to final approval of plats, but will be a condition precedent to the erection of buildings on lands included in the approved plat.

(4.1) Provisions which apply uniformly throughout the municipality regulating minimum setback lines and minimum lot sizes which are based upon the availability of water and sewage, in the event the municipality has not enacted a zoning ordinance.

(5) Provisions for encouraging and promoting flexibility, economy and ingenuity in the layout and design of subdivisions and land developments, including provisions authorizing alterations in site requirements and for encouraging other practices which are in accordance with

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[6] 53 P.S. § 10509.

modern and evolving principles of site planning and development.

(6) Provisions for encouraging the use of renewable energy systems and energy-conserving building design.

(7) Provisions for soliciting reviews and reports from adjacent municipalities and other governmental agencies affected by the plans.

(8) Provisions for administering waivers or modifications to the minimum standards of the ordinance in accordance with section 512.1,[7] when the literal compliance with mandatory provisions is shown to the satisfaction of the governing body or planning agency, where applicable, to be unreasonable, to cause undue hardship, or when an alternative standard can be demonstrated to provide equal or better results.

(9) Provisions for the approval of a plat, whether preliminary or final, subject to conditions acceptable to the applicant and a procedure for the applicant's acceptance or rejection of any conditions which may be imposed, including a provision that approval of a plat shall be rescinded automatically upon the applicant's failure to accept or reject such conditions within such time limit as may be established by the governing ordinance.

(10) Provisions and standards for insuring that new developments incorporate adequate provisions for a reliable, safe and adequate water supply to support intended uses within the capacity of available resources.

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[7] 53 P.S. § 10512.1.

(11) Provisions requiring the public dedication of land suitable for the use intended; and, upon agreement with the applicant or developer, the construction of recreational facilities, the payment of fees in lieu thereof, the private reservation of the land, or a combination, for park or recreation purposes as a condition precedent to final plan approval, provided that:

(i) The provisions of this paragraph shall not apply to any plan application, whether preliminary or final, pending at the time of enactment of such provisions.

(ii) The ordinance includes definite standards for determining the proportion of a development to be dedicated and the amount of any fee to be paid in lieu thereof.

(iii) The land or fees, or combination thereof, are to be used only for the purpose of providing park or recreational facilities accessible to the development.

(iv) The governing body has a formally adopted recreation plan, and the park and recreational facilities are in accordance with definite principles and standards contained in the subdivision and land development ordinance.

(v) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by future inhabitants of the development or subdivision.

(vi) A fee authorized under this subsection shall, upon its receipt by a municipality, be deposited in an interest-bearing account, clearly identifying the specific recreation facilities for which the fee was received.

Interest earned on such accounts shall become funds of that account. Funds from such accounts shall be expended only in properly allocable portions of the cost incurred to construct the specific recreation facilities for which the funds were collected.

(vii) Upon request of any person who paid any fee under this subsection, the municipality shall refund such fee, plus interest accumulated thereon from the date of payment, if the municipality had failed to utilize the fee paid for the purposes set forth in this section within three years from the date such fee was paid.

(viii) No municipality shall have the power to require the construction of recreational facilities or the dedication of land, or fees in lieu thereof, or private reservation except as may be provided by statute.

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§ 10503-A. Grant of power

(a) The governing body of each municipality other than a county, in accordance with the conditions and procedures set forth in this act, may enact, amend and repeal impact fee ordinances and, thereafter, may establish, at the time of municipal approval of any new development or subdivision, the amount of an impact fee for any of the offsite public transportation capital improvements authorized by this act as a condition precedent to final plat approval under the municipality's subdivision and land development ordinance. Every ordinance adopted pursuant to this act shall include, but not be limited to, provisions for the following:

(1) The conditions and standards for the determination and imposition of impact fees consistent with the provisions of this act.

(2) The agency, body or office within the municipality which shall administer the collection, disbursement and accounting of impact fees.

(3) The time, method and procedure for the payment of impact fees.

(4) The procedure for issuance of any credit against or reimbursement of impact fees which an applicant may be entitled to receive consistent with the provisions of this act.

(5) Exemptions or credits which the municipality may choose to adopt. In this regard the municipality shall have the power to:

(i) Provide a credit of up to 100% of the applicable impact fees for all new development and growth which constitutes affordable housing to low- and moderate-income persons.

(ii) Provide a credit of up to 100% of the applicable impact fees for growth which are determined by the municipality to serve an overriding public interest.

(iii) Exempt de minimus applications from impact fee requirements. If such a policy is adopted, the definition of de minimus shall be contained in the ordinance.

(b) No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution

in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.

(c) No municipality may levy an impact fee prior to the enactment of a municipal impact fee ordinance adopted in accordance with the procedures set forth in this act, except as may be specifically authorized by the provisions of this act. A transportation impact fee shall be imposed by a municipality within a service area or areas only where such fees have been determined and imposed pursuant to the standards, provisions and procedures set forth herein.

(d) Impact fees may be used for those costs incurred for improvements designated in the transportation capital improvement program which are attributable to new development, including the acquisition of land and rights-of-way; engineering, legal and planning costs; and all other costs which are directly related to road improvements within the service area or areas, including debt service. Impact fees shall not be imposed or used for costs associated with any of the following:

(1) Construction, acquisition or expansion of municipal facilities other than capital improvements identified in the transportation capital improvements plan required by this act.

(2) Repair, operation or maintenance of existing or new capital improvements.

(3) Upgrading, updating, expanding or replacing existing capital improvements to serve existing developments in order to meet stricter safety, efficiency, environmental or regulatory standards not attributable to new development.

(4) Upgrading, updating, expanding or replacing existing capital improvements to remedy deficiencies in service to existing development or fund deficiencies in existing municipal capital improvements resulting from a lack of adequate municipal funding over the years for maintenance or capital construction costs.

(5) Preparing and developing the land use assumptions, roadway sufficiency analysis and transportation capital improvement plan, except that impact fees may be used for no more than a proportionate amount of the cost of professional consultants incurred in preparing a roadway sufficiency analysis of infrastructure within a specified transportation service area, such allowable proportion to be calculated by dividing the total costs of all road improvements in the adopted transportation capital improvement program within the transportation service area attributable to projected future development within the service area, as defined in section 504-A(e)(1)(iii),[1] by the total costs of all road improvements in the adopted transportation capital improvement program within the specific transportation service area, as defined in section 504-A.

(e) Nothing in this act shall be deemed to alter or affect a municipality's existing power to require an applicant for municipal approval of any new development or subdivision from paying for the installation of onsite improvements as provided for in a municipality's subdivision and land development ordinance as authorized by this act.

(f) No municipality may delay or deny any application for building permit, certificate-of-occupancy, development or any other approval or permit required for construction,

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[1] 53 P.S. § 10901 et seq.

land development, subdivision or occupancy for the reason that any project of an approved capital improvement program has not been completed.

(g) A municipality which has enacted an impact fee ordinance on or before June 1, 1990, may for a period not to exceed one year from the effective date of this article, adopt an impact fee ordinance to conform with the standards and procedures set forth in this article. Where a fee previously imposed pursuant to an ordinance in effect on June 1, 1990, for transportation improvements authorized by this article is greater than the recalculated fee due under the newly adopted ordinance, the individual who paid the fee is entitled to a refund of the difference. If the recalculated fee is greater than the previously paid fee, there shall be no additional charge.

(h) The powers provided by this section may be exercised by two or more municipalities, other than counties, which have adopted a joint municipal comprehensive plan pursuant to Article XI[1] through a joint municipal authority, subject to the conditions and procedures set forth in this Article.

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[1] 53 P.S. § 10901 et seq.

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§ 10603. Ordinance provisions

(a) Zoning ordinances should reflect the policy goals of the statement of community development objectives required in section 606,[1] and give consideration to the character of the municipality, the needs of the citizens and

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[1] 53 P.S. § 10606.

the suitabilities and special nature of particular parts of the municipality.

(b) Zoning ordinances may permit, prohibit, regulate, restrict and determine:

(1) Uses of land, watercourses and other bodies of water.

(2) Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.

(3) Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.

(4) Density of population and intensity of use.

(5) Protection and preservation of natural resources and agricultural land and activities.

(c) Zoning ordinances may contain:

(1) provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act;

(2) provisions for conditional uses to be allowed or denied by the governing body pursuant to public notice and hearing and recommendations by the planning agency and pursuant to express standards and criteria set forth in the zoning ordinances. In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance;

(2.1) When an application for either a special exception or a conditional use has been filed with either the zoning hearing board or governing body, as relevant, and the subject matter of such application would ultimately constitute either a "land development" as defined in section 107[2] or a "subdivision" as defined in section 107, no change or amendment of the zoning, subdivision or other governing ordinance or plans shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed. Provided, further, should such an application be approved by either the zoning hearing board or governing body, as relevant, applicant shall be entitled to proceed with the submission of either land development or subdivision plans within a period of six months or longer or as may be approved by either the zoning hearing board or the governing body following the date of such approval in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed before either the zoning hearing board or governing body, as relevant. If either a land development or subdivision plan is so filed within said period, such plan shall be subject to the provisions of section 508(1) through (4),[3] and specifically to the time limitations of section 508(4) which shall commence as of the date of filing such land development of subdivision plan;

(2.2) provisions for regulating transferable development rights, on a voluntary basis, including provisions for the protection of persons acquiring the

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[2] 53 P.S. § 10107.

[3] 53 P.S. § 10508.

same, in accordance with express standards and criteria set forth in the ordinance and section 619.1;[4]

(3) provisions for the administration and enforcement of such ordinances;

(4) such other provisions as may be necessary to implement the purposes of this act;

(5) provisions to encourage innovation and to promote flexibility, economy and ingenuity in development, including subdivisions and land developments as defined in this act;

(6) provisions authorizing increases in the permissible density of population or intensity of a particular use based upon expressed standards and criteria set forth in the zoning ordinance; and

(d) Zoning ordinances may include provisions regulating the siting, density and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies to support the intended land uses within the capacity of available water resources.

(e) Zoning ordinances may not unduly restrict the display of religious symbols on property being used for religious purposes.

(f) Zoning ordinances may not unreasonably restrict forestry activities.

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[4] 53 P.S. § 10619.1.

§ 10603.1. Interpretation of ordinance provisions

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

ANALYSIS OF REVISIONS TO THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE
(Act 247 of 1968, as amended by Act 170 of 1988)

ARTICLE V – SUBDIVISION AND LAND DEVELOPMENT

Section 501: Grant of Power.

The major change in this section is the mandatory submission to the governing body or designated planning agency of *all subdivision and land development plats* that fall within the definitions in Article I whenever a municipality enacts a subdivision and land development ordinance. This is consistent with a second major change in Article V, found in Section 503(1.1), which has the effect of requiring that a municipality follow the MPC definition of "land development" with the exceptions noted in that clause. Under prior law, a municipality could define land development as it wished provided it did not exceed the parameters of the MPC's definition. Now the MPC's definition governs with the exceptions noted in Section 503(1.1), and the processing of subdivision and land development plans is mandatory.

The reference to a PRD "*ordinance*" is also editorially amended to read PRD "*provisions*" to conform to changes made to Article VII.

Section 502: Jurisdiction of County Planning Agencies; Adoption by Reference of County Subdivision and Land Development Ordinances.

This section is divided to facilitate reading, and the general terms "municipality" and "municipalities" are used in order to provide consistency with other sections of the MPC.

Subsection (a). This subsection is editorially amended.

Subsection (b). In this subsection the time period for review of subdivision and land development applications by county planning agencies is reduced to 30 days from 45 days to expedite the plat approval process.

Subsection (c). This subsection provides that the county planning agency must concur when a municipality wishes to designate the county planning agency as its official administrative agency for review and approval of plats after adopting, by reference, the subdivision and land development ordinance of the county.

Section 503: Contents of Subdivision and Land Development Ordinance.

This section sets forth various provisions which may be included in a subdivision and land development ordinance.

Clause (1). This clause is amended to specifically give municipalities authority to charge fees for review of subdivision and land development plans and to require certification of the accuracy of plats. Review fees, based upon a schedule established by ordinance or resolution, are defined as those reasonable and necessary charges required by a municipality to compensate its professional consultants or engineers for services rendered in the review process; however, fees shall not exceed actual charges of these consultants and engineers. This clause also provides for an arbitration-type process by which applicants who dispute these fees may resolve this matter in accordance with the procedure set forth in Section 510(g).

Clause (1.1). This new clause is added to permit a local option for waiver of the broader definition of land

development provided in Section 107, in order to avoid potential hardships on those attempting to convert existing single family dwellings into three or fewer residential units (excluding condominiums); or to construct accessory buildings, including farm buildings; or the addition or conversion of buildings or rides within the confines of an amusement park.

Clause (2). This clause is not amended.

Clause (3). This clause is amended to add a cross-reference to Section 509 to reflect the more detailed provisions in that section relating to completion of improvements and guarantees.

Clause (4). This clause is amended to add language to clarify that any land development which is not immediate may be excused from requirements for installation of improvements as a condition for final plat approval.

Clause (4.1). This new clause is added to assist municipalities that have adopted a subdivision and land development ordinance but have chosen not to enact a zoning ordinance. Under this new provision, a municipality may provide for minimum lot sizes and setbacks in its subdivision and land development ordinance, if they are based on the availability of water and sewage services.

This new clause will now enable those municipalities which have not enacted a zoning ordinance to provide for uniform setback lines and minimum lot sizes. In Bd. of Supervisors of Franklin Twp. v. Meals, 57 Pa. Cmwlth. 129, 426 A.2d 1200 (1981), the Court had ruled that these regulations were invalid without enactment of a zoning ordinance. Now, a municipality without a zoning ordinance

may still provide for setbacks and minimum lot sizes, which are essentially "zoning principles."

Clause (5). This clause is amended to clarify that either the governing body or the planning agency (if authorized in the ordinance) may administer the ordinance and permit alterations in the site requirements.

Clause (6). This clause is not amended.

Clause (7). This new clause is added to encourage coordination with adjacent municipalities and other levels of government which are affected by land development plans by authorizing solicitation of reviews and reports from these municipalities and other governmental agencies.

Clause (8). This new clause is added to permit a municipality to grant waivers or modifications to minimum standards in a land development ordinance when literal compliance would be unreasonable, cause undue hardship, or when an alternative standard can be shown to provide equal or better results. The procedure for granting such waivers in Section 512.1 is cross-referenced.

Clause (9). This new clause is proposed to clarify that a municipality may impose conditions for the approval of plats whether preliminary or final. It also provides that the municipality establish a procedure for an applicant's acceptance or rejection of conditions.

This amendment is intended to delineate the authority of a municipality to impose prerequisites for subdivision and land development approvals, while equitably providing a developer the opportunity to notify the municipality of either the rejection or acceptance of the conditions. It is anticipated that a developer's rejection of the conditions

will be deemed a disapproval of the application It should be noted that a municipality must render a written decision supporting any conditions pursuant to Section 508(1) and Section 508(2) in accordance with the holding in Board of Commissioners of Annville Township v. Livengood, 44 Pa. Cmwlth. 336, 403 A.2d 1955, (1979).

Clause (10). This new clause insures that developments include provisions for reliable, safe, and adequate water supply.

Clause (11). This new clause provides specific standards and prerequisites for mandatory open space and recreation land dedication, the construction of recreational facilities, or fees in-lieu-of dedication, including a formally adopted recreation plan in accordance with definite ordinance standards.

The provisions of this clause are intended to avoid arbitrary and abusive application of such requirements by establishing basic "ground rules" which are intended to limit municipal discretion. This language was originally proposed by the Task Force, excised in the Senate, and reinstated as amended by the House Local Government Committee.

Section 503.1: Water Supply.

This section was added by amendment in the Senate Local Government Committee at the request of the Public Utility Commission (PUC). The intent is to insure that every owner of a lot within a subdivision or development shall have access to available water supply by requiring an applicant to present evidence in the form of a PUC Certificate of Public Convenience, an application therefor, an

agreement to provide water service from a bona fide cooperative association of lot owners, or a written agreement from a municipal authority or utility that such a water supply is available. If water is supplied by private wells owned and maintained by lot owners, this section does not apply.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD., Plaintiff v. THORNBURY TOWNSHIP, Chester County, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, and the members of the Board of Supervisors in their official capacity: PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MacDONNELL, Defendants	Civil Action No. 99-CV-6460

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON and ROBERT A. MacDONNELL

Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell ("Supervisors") move this court for entry of summary judgment in their favor and against the plaintiff for the reasons set forth as follows:

1. Plaintiff, Thornbury Noble, Ltd., filed a complaint on or about December 19, 1999 asserting violations of its substantive due process rights pursuant to 42 U.S.C. {s}1983 (Count I), violation of the Pennsylvania Municipalities Planning Code ("MPC") (Count II), Temporary Regulatory Taking (Count III), and the state law claim of

Intentional Interference With Contractual Relations (Count IV).

2. Defendants timely filed a motion to dismiss Plaintiff's Complaint.

3. By Order dated September 20, 2000, the Court granted Defendants' motion to dismiss Count III in its entirety, and Count IV, as to the Township and Township Board of Supervisors only. By Order dated November 9, 2000, the Court granted Defendants' motion to dismiss Count II.

4. The only remaining claims at issue were Plaintiffs claim for violations of substantive due process against the Township, the Township Board of Supervisors and the five Supervisors (Count I), and the state law claim of interference with contract against the Supervisors (Count IV).

5. Defendants filed a Motion for Summary Judgment, which was granted in part and denied in part by Order dated March 29, 2002. The Court dismissed the state law claim, but allowed the federal law claim regarding substantive due process to move forward because Plaintiff raised an issue of fact concerning "improper motives".

6. The Third Circuit Court of Appeals recently held in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 2003 WL 115585 (Jan. 14, 2003), inter alia, that a landowner may no longer base a substantive due process claim upon allegations of "improper motives".

7. The Court in *United Artists* also held that a landowner's substantive due process claim against a municipality and its officials must demonstrate that the disputed actions "shock the conscience".

8. For the following reasons, Plaintiff's claim must be dismissed as a matter of law:

A. Plaintiff's claim that Defendants' actions were based upon improper motives fails as a matter of law to demonstrate a cause of action pursuant to 42 U.S.C. {s}1983;

B. All disputed actions by Defendants are rationally related to a legitimate governmental interest and therefore cannot violate Plaintiff's substantive due process rights as a matter of law;

C. Defendants' actions do not shock the conscience as a matter of law;

D. Plaintiff's constitutional claims are not ripe for determination; and,

E. Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell are entitled to absolute and/or qualified immunity.

9. Defendants' initial Motion for Summary Judgment and in all supporting briefs, including the attached Brief, are incorporated herein by reference.

WHEREFORE, Defendants Patricia A. Dewey, J. Christopher Lang, William A. Schmidt, Jr., Charles Wilson and Robert MacDonnell respectfully request this Honorable Court to grant their Renewed Motion for Summary

Judgment and dismiss all claims against them with prejudice.

SIANA, BELLWOAR & MCANDREW, LLP

By: /s/ Andrew J. Bellwoar
Andrew J. Bellwoar, Esquire
Christopher J. Gerber, Esquire
Attorneys for Defendants
Patricia A. Dewey, J.
Christopher Lang,
William A. Schmidt, Jr.
Charles Wilson and
Robert Mac Donnell

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
BY: John P. Gonzales, Esquire
Identification No. 71265
One Montgomery Plaza, Suite 1002
Norristown, PA 19401
(610) 292-4470

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	:	
vi [sic].	:	
THORNBURY TOWNSHIP, CHESTER COUNTY, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, AND THE MEMBERS OF THE BOARD OF SUPERVISORS IN THEIR OFFICIAL CAPACITY, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MACDONNELL	:	No. 99-CV-6460

ORDER

AND NOW, this ___ day of ___, 2003, upon consideration of the Renewed Motion for Summary Judgment of Defendants, Thornbury Township and the Thornbury Township Board of Supervisors, and any response thereto, it is hereby ORDERED and DECREED that Defendants' Renewed Motion for Summary Judgment is GRANTED

and any and all claims against Moving Defendants are dismissed with prejudice.

BY THE COURT:

_____

J.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
BY: John P. Gonzales, Esquire
Identification No. 71265
One Montgomery Plaza, Suite 1002
Norristown, PA 19401
(610) 292-4470

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.,	:	
v.	:	
THORNBURY TOWNSHIP, CHESTER COUNTY, THORNBURY TOWNSHIP BOARD OF SUPERVISORS, AND THE MEMBERS OF THE BOARD OF SUPERVISORS IN THEIR OFFICIAL CAPACITY, PATRICIA A. DEWEY, J. CHRISTOPHER LANG, WILLIAM A. SCHMIDT, JR., CHARLES A.W. WILSON, and ROBERT A. MACDONNELL	:	No. 99-CV-6460

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, THORNBURY TOWNSHIP AND THORNBURY TOWNSHIP BOARD OF SUPERVISORS

1. Plaintiff, Thornbury Noble, Ltd., filed a Complaint on or about December 19, 1999 asserting violations of its civil rights and related state law claims arising from various land-use decisions made by the Defendants concerning a property owned by the Plaintiff.

2. Moving Defendants, Thornbury Township and the Thornbury Township Board of Supervisors filed a Motion for Summary Judgment which was granted in part and denied in part by Order dated March 29, 2002. The Court denied Moving Defendants' Motion for Summary Judgment regarding Plaintiffs Substantive Due Process claim because the Court held that Plaintiff raised an issue of fact whether the land-use decisions at issue were based upon "improper motives."

3. The Third Circuit Court of Appeals, in *United Artists Theater Circuit. Inc. v. Township of Warrington,* 316 F.3d 392 (3d Cir.), *Reh'g denied,* 324 F.3d 133 (3d Cir. 2003) recently overruled prior Third Circuit precedent and held that a landowner cannot rely upon allegations of "improper motives" to support a Substantive Due Process claim. To the contrary, the Third Circuit has now established a "shocks the conscience" standard to be applied in Substantive Due Process claims.

4. Defendants resubmit this Motion for Summary Judgment in light of the Third Circuit's decision in *United Artists,* and contend that Plaintiffs Complaint and all claims against Moving Defendants should be dismissed as a matter of law.

5. Moving Defendants incorporate by reference as if same were more fully set forth herein at length, the Memorandum of Law which is attached hereto. Defendants further incorporate by reference, the Motion and Supporting Briefs filed on behalf of the individual Defendants.

WHEREFORE, Defendants, Thornbury Township and the Thornbury Township Board of Supervisors, respectfully request that this Honorable Court grant

their renewed Motion for Summary Judgment and dismiss any and all claims against Moving Defendants with prejudice.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

BY: /s/ John P. Gonzales
JOHN P. GONZALES, ESQUIRE
Attorney for Defendants

DATE: 5/8/03

EXHIBIT 5

1989 – 5

ORDINANCE ADOPTING AN AMENDMENT TO THE ZONING MAP OF THORNBURY TOWNSHIP, CHESTER COUNTY, TO CHANGE THE ZONING CLASSIFICATION OF CERTAIN PROPERTIES AT THE SOUTHEAST CORNER OF THE INTERSECTION OF ROUTES 202 and 926 FROM "A" AGRICULTURAL AND RESIDENTIAL TO "B" BUSINESS DISTRICT, AMENDING THE SPECIAL REGULATIONS APPLICABLE TO THE "B" BUSINESS DISTRICT TO PROVIDE FOR A FIFTY FOOT BUFFER PLANTING STRIP WHERE PROPERTY WITHIN A COMMERCIAL DEVELOPMENT ABUTS A RESIDENTIAL DISTRICT, AND REPEALING INCONSISTENT PROVISIONS OF SAID REGULATIONS

IT IS HEREBY ENACTED AND ORDAINED by the Board of Supervisors of Thornbury Township, Chester County, Pennsylvania that the Zoning Map of Thornbury Township, dated December, 1983, and referred to and made part of the Zoning Ordinance of Thornbury Township, by Section 202 thereof, and the Zoning Ordinance of Thornbury Township, as both Map and Ordinance have been amended, are hereby amended in the following respects.

SECTION 1. The following described properties shall be changed in classification from the "A" Agricultural and Residential District (as described in Part 3 of the Zoning Ordinance) to the "B" Business District classification (as described in Part 4 of the Zoning Ordinance):

ALL THAT CERTAIN tract of land situate in Thornbury Township, Chester County, Pennsylvania, bounded

and described according to a plan made by GEO-Technical Services, Inc., 851 South 19th Street, Harrisburg, PA, 17104, dated April, 1989, as follows:

BEGINNING at a point in the centerline of Street Road (Route 926), distant North 69 degrees 00 minutes East, 500 feet measured along said centerline of Street Road from the intersection thereof with the centerline of the Wilmington-West Chester Turnpike, said point of beginning being the corner of the existing commercial zoning (Parcel #3) and Parcel #4; thence from said point of beginning along said centerline of Street Road to a point, North 69 degrees 00 minutes East a distance of 185.00 feet, said point being the corner of Parcel #4 and Parcel #5; thence along the centerline of Street Road and Parcel #5, the following two courses and distances: (1) North 69 degrees 00 minutes East a distance of 5.66 feet; (2) North 67 degrees 08 minutes East a distance of 53.47 feet to a point; thence on a line through Parcel #5 South 21 degrees 00 minutes East a distance of 501.74 feet to a point on the line dividing Parcel #5 and the N/L property of May Hohenberger; thence along said line South 69 degrees 00 minutes West a distance of 244.10 feet to a point, said point being the corner of Parcel #5 and Parcel #3; thence along a line dividing Parcel #5 and Parcel #3 North 21 degrees 00 minutes West a distance of 285.00 feet to a point, said point being the corner of Parcel #5 and Parcel #4; thence along the dividing line of Parcel #3 and Parcel #4, North 21 degrees 00 minutes West 215.00 feet to the point of beginning.

CONTAINING 0.913 acres in Parcel #4 and 1.890 acres of Parcel #5, the total area being 2.803 acres.

SECTION 2. The Zoning Map of Thornbury Township shall be modified by the Thornbury Township engineer to include the properties described in Section 1 hereof to establish the precise limits of the foregoing Map amendment, which modification shall be conclusive as to the extent of such Map change.

SECTION 3. Section 404.3 of the Zoning Ordinance is amended to read in its entirety as follows:

3. Along each side or rear property line which directly abuts a residence district in the Township or a similar district in an adjoining municipality, there shall be a buffer planting strip not less than fifty (50) feet in width. The buffer planting strip shall comply with the following:

   A. The buffer planting strip shall be measured from the district boundary line or from the near street line where a street serves as the district boundary line. The buffer planting strip shall not be part of a street right-of-way but shall be in addition thereto.

   B. The buffer planting strip may be included with the required side or rear yard, and in case of conflict the larger yard requirement shall apply.

   C. Within the buffer planting strip, the exterior width beyond the planting screen, as described in Section 103, shall be planted with grass seed, sod or ground cover and shall be maintained and kept clean of all debris, rubbish, weeds and tall grass (in excess of twelve (12) inches).

   D. The buffer planting strip shall be a landscaped area free of structures, materials and

vehicular parking. No driveways or streets shall be permitted in the buffer planting strip except at points of ingress and egress.

E. The Board of Supervisors may, in its sole discretion, permit all or a portion of the buffer planting strip to be located within the abutting residence district where the abutting residential property is owned or controlled by the owner of the property within the zoning district, where such abutting residential property forms part of the lot being developed for commercial purposes and where it determines that the intent of the buffer planting strip regulations will be met. In the event the Board of Supervisors permits the buffer planting strip to be so located, it shall require that appropriate perpetual easements and restrictions be placed upon that portion of the abutting residential property being used for the buffer planting strip.

SECTION 4. Section 406.9, Buffer Requirement, is hereby repealed, and Section 406.10 is redesignated Section 406.9.

ENACTED AND ORDAINED this 10th day of July 1989.

BOARD OF SUPERVISORS
THORNBURY TOWNSHIP

ATTEST:

/s/ Judith S. Mankin
Secretary

/s/ Bates, Chairman
/s/ Swinehart
/s/ John Massengale

EXHIBIT 7

ZONING

Chapter 155

From the

CODE

of the

Township
of
THORNBURY

GENERAL CODE PUBLISHERS CORP.
72 Hinchey Road
Rochester, New York 14624

July 1997

ARTICLE VII
B Business Districts

§ 155-33. B Business District established.

Business districts are intended to:

A. Provide sufficient space in appropriate locations for the types of shopping, professional and service establishments anticipated to be needed in the township.

B. Protect commercial development against intrusive uses which are incompatible and against objectionable influences such as noise or glare and from hazards of fire.

C. Provide appropriate space for the requirements of commerce, including the provision of off-street parking spaces, safe circulation of pedestrian and motor traffic in the zone and in nearby areas.

D. Promote the most desirable use of land and pattern of building development in accord with a well-considered

plan for the district as a whole and to protect the character of the area and nearby districts.

§ 155-34. Procedures.

To assure a fair and comprehensive review of applications under these sections, any owner of a tract of land within these zoning districts desiring to construct a commercial facility shall submit the following:

A. The initial application shall include a site layout, typical front and side elevations, typical floor plan, landscaping plans, as well as an engineering plan showing the proposed method of water runoff control and type of sewage treatment.

B. A schematic drawing shall be supplied indicating the areas required for loading and unloading. A statement shall accompany this which indicates the manner and frequency of use of such facilities.

§ 155-35. Permitted uses. [Amended 11-3-1998 by Ord. No. 1998-4]

A. Uses by right. A building may be erected or used and a lot may be used or occupied for any of the following purposes:

(1) Retail store.

(2) Personal service shop, including barbershop, beautician, dry cleaning, laundry, tailoring and shoe repair.

(3) Bank or other financial institution.

(4) Offices.

(5) Automobile service stations;

(6) Shop of furniture makers, cabinet makers, carpenters, upholsterers, electricians, tinsmiths, plumbers or other similar crafts.

(7) Bakeries.

(8) Restaurants.

(9) Accessory use on the same lot which may include:

(a) Storage within a completely enclosed building in conjunction with a permitted use.

(b) Parking.

(c) Signs as permitted in these regulations.

B. Conditional uses. The following uses shall be permitted as a conditional use when authorized by the Board of Supervisors in accordance with the standards and procedures set forth in § 155-82.1. for the grant of a conditional use:

(1) Shopping center development aggregating over 30,000 feet square or more of gross floor area.

§ 155-71. Expiration of special exceptions and variances. [Amended 8-12-1985 by Ord. No. 81285-A]

Unless otherwise specified by the Zoning Hearing Board, a special exception or variance which has been authorized by the Zoning Hearing Board shall expire if the applicant fails to obtain a building or use permit within six months from the date of authorization thereof or fails to commence a substantial amount of work within six months from the date of issuance of the permit for such work. Owners of properties wherein a special exception or variance has

been granted must reapply for additional relief when changes are requested beyond the original authorization.

§ 155-72. Fees.

Fees for a hearing before the Zoning Hearing Board should be paid for by the applicant in amounts established by the Board of Supervisors by resolution from time to time.[9]

ARTICLE XII
Amendments

§ 155-73. Amendment procedure.

The Board of Supervisors may amend, supplement, change, modify or repeal the regulations herein prescribed, restrictions, boundaries and other provisions of this Part I in the following manner:

A. The Board of Supervisors shall hold a public hearing upon a proposed amendment or change in this Zoning Ordinance.

B. The Board of Supervisors shall hold the public hearing after giving notice published once each week for two successive weeks in a newspaper of general circulation in the township. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing. All other notices and

[9] Editor's Note. Former sections 851 through 854, regarding fees for curative amendment, which immediately followed this section, were deleted at time of adoption of Code (see Ch. 1, General Provisions, Art. I).

procedures relating to amendment of zoning ordinances and maps contained in Section 609 of the Pennsylvania Municipalities Code shall be observed.[10] **[Amended 10-2-1989 by Ord. No. 1989-6]**

C. An opportunity shall be presented at such hearing for all interested parties and citizens to be heard.

§ 155-74. Hearing.

Whenever 50% or more of the owners of property in the township shall present to the Board of Supervisors a petition duly signed and acknowledged requesting an amendment, supplement, change, modification or repeal of the regulations prescribed for or of the Zoning Maps,[11] including such district or part thereof, it shall be the duty of the Board of Supervisors to hold a public hearing thereon and to cause notice thereof to be given in the manner prescribed in § 155-73.

ARTICLE XIII
Enforcement; Remedies; Administration

§ 155-75. Appointment of officers.

There shall be a Zoning Officer and an Enforcement Officer, neither of whom shall be a member of the Zoning Hearing Board, and each officer shall be appointed by the Board of Supervisors to serve for a period of one year.

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[10] Editor's Note: See 53 PS. § 10609.

[11] Editor's Note: The Zoning Map is on file in the township offices.

§ 155-76. Zoning permit.[12]

A zoning permit shall be required prior to the erection of any building. Applications for permits shall be made, in writing, to the Enforcement Officer and shall contain adequate information for such officer to ascertain whether or not the proposed building complies with the provision of this Part I. Permits shall be granted or refused, in writing, within 15 days after receipt of application and shall be valid for one year from the date of issue. Permits may be renewed annually within 15 days from the expiration thereof for additional successive periods of one year, but each such renewal permit and the issuance thereof shall be subject to the provisions of all of the applicable township ordinances and any rules, regulations and resolutions made pursuant thereto which are in effect on the date of renewal, which shall be the date of the expiration of the preceding permit. Failure to renew within the required time shall terminate all renewal privileges. Before any renewal permit shall be issued, the permittee shall pay an additional fee in an amount as set from time to time by resolution of the Board of Supervisors, and the cost of any additional inspection or other services required to be performed by the township officer prior to the issuance of such permit.

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[12] Editor's Note: Amended at time of adoption of Code (see Ch. 1, General Provisions, Art I).

EXHIBIT 8

SUBDIVISION AND LAND DEVELOPMENT

Chapter 115

from the CODE

of THORNBURY TOWNSHIP,

Chester County, Pennsylvania

General Code Publishers Corp.
72 Hinchey Road
Rochester, New York 14624

July, 1997

Chapter 115

SUBDIVISION AND LAND DEVELOPMENT

ARTICLE I
General Provisions

§ 115-1. Short title.
§ 115-2. Purpose.
§ 115-3. Control.
§ 115-4. Jurisdiction.

ARTICLE II
Terminology

§ 115-5. Word usage.
§ 115-6. Definitions.

ARTICLE III
Construal of Provisions

§ 115-7. Compliance.
§ 115-8. Approval requirements.
§ 115-9. Applicability.

ARTICLE IV
Administration

§ 115-10. Enforcement.
§ 115-11. Inspections.
§ 115-12. Fees.
§ 115-13. Restrictions.
§ 115-14. Exception.

ARTICLE V
Procedures

§ 115-15. General requirements.
§ 115-16. Plan submission.
§ 115-17. Submission to other agencies.
§ 115-18. Submission of sketch plan.
§ 115-19. Review of sketch plan.
§ 115-20. Submission of preliminary plan.
§ 115-21. Review of preliminary plan.
§ 115-22. Submission of final plan.
§ 115-23. Review of final plan.
§ 115-24. Recording of final plan.
§ 115-25. Exempted plans.
§ 115-26. Resubdivision procedure.
§ 115-27. Dedication documents.

ARTICLE VI
Plan Submission Requirements

§ 115-28. Sketch plan.
§ 115-29. Preliminary plan.
§ 115-30. Final plan.
§ 115-31. As-built plan.

ARTICLE VII
Agreements

§ 115-32. Agreement specifications.

ARTICLE VIII
Development and Design Standards

§ 115-33. Application.
§ 115-34. Land and use requirements.
§ 115-35. General standards for public streets.
§ 115-36. Partial and half streets.
§ 115-37. Street widths.
§ 115-38. Street grades.
§ 115-39. Horizontal curves.
§ 115-40. Vertical curve.
§ 115-41. Intersection.
§ 115-42. Sight distance at intersections.
§ 115-43. Restriction of access.
§ 115-44. Curbs, gutters and sidewalks.
§ 115-45. Street names and signs.
§ 115-46. Block layout.
§ 115-47. Lots and parcels.
§ 115-48. Stormwater management.
§ 115-49. Stormwater management plan.
§ 115-50. Public facilities and open space.
§ 115-51. Community assets.
§ 115-52. Utility and drainage easements.

ARTICLE IX
Improvement Construction Standards

§ 115-53. General requirements.
§ 115-54. Sanitary sewage disposal.
§ 115-55. Water distribution system.
§ 115-56. Fire hydrants.
§ 115-57. Street construction.
§ 115-58. Curbs and/or gutters.
§ 115-59. Stormwater and runoff control.
§ 115-60. Monuments.
§ 115-61. Shade trees.
§ 115-62. Street identification signs.
§ 115-63. Driveway construction within right-of-way.

ARTICLE X
Acceptance of Improvements

§ 115-64. Conditions of acceptance of streets and other improvements.
§ 115-65. Dedication of streets and other improvements.
§ 115-66. Acceptance of streets and other improvements.
§ 115-67. Dedication of sanitary sewers.
§ 115-68. Acceptance of sanitary sewers.
§ 115-69. Township responsibility to accept.
§ 115-70. Recreational facilities.

ARTICLE XI
Enforcement

§ 115-71. Amendments.
§ 115-72. Violations and penalties.
§ 115-73. Appeals.
§ 115-74. Preventive remedies.
Driveway Requirements:
Minimum Specifications

[HISTORY: Adopted by the Board of Supervisors of the Township of Thornbury as Ch. 22 of the 1983 Code. Amendments noted where applicable.]

GENERAL REFERENCES

Comprehensive Plan – See Ch. 6.
Planning Commission – See Ch. 46.
Building construction – See Ch. 60.
Numbering of buildings – See Ch. 64.
Fences, walls and screens – See Ch. 76.
Sewers – See Ch. 105.
Streets and sidewalks – See Ch. 108.
Trees – See Ch. 129.

Water – See Ch. 150.
Zoning – See Ch. 155.

ARTICLE I
General Provisions

§ 115-1. Short title.

This chapter shall be known and may be cited as the "The Thornbury Township Subdivision and Land Development Ordinance of 1983."

§ 115-2. Purpose.

The purpose of this chapter is to protect and promote safety, health and morals; to secure sites suitable for building purposes and human habitation while protecting the soils, vegetation, quality of the waters and other elements of the ecology; to accomplish a coordinated development of the township; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit the township to minimize such problems as may presently exist or which may be foreseen.

§ 115-3. Control.

A. Subdivision control. No subdivision or resubdivision of a lot, tract or parcel of land shall be effected, and no street, sanitary sewer, storm drain, water main or other facility in connection therewith shall be laid out, constructed, opened or dedicated for public use or

travel, or for the common use of occupants of buildings abutting hereon, except in strict accordance with the provisions of this chapter.

B. Land development control. No excavating, filling or grading of the soil, and no construction, demolition or installation which directly or indirectly disturbs the soil, except in the process of gardening or farming operations, shall be effected, nor shall any structure or building, whether prefabricated, precut, preassembled, or otherwise be erected or placed on any lot, tact or parcel of land, except in strict accordance with the provisions of this chapter.

C. Sale of lots; permits; erection of buildings or on-site improvements. In a subdivision, no lot may be used or sold, no building permit may be issued and no building or other structure may be erected unless and until a plan for such subdivision shall have been approved and duly recorded, and a grading plan, including a complete conservation plan for erosion and sediment control, has been duly approved, and until either the required on-site and/or public improvements in connection therewith from the lot or building to an existing improved street, or otherwise, shall have been constructed or the township has been assured, by means of a proper completion guaranty in the form of an acceptable bond or deposit of funds or securities in escrow sufficient to cover the cost of all required public and on-site improvements, as estimated by the Township Engineer, that such public and on-site improvements will subsequently be installed by the subdivider or owner of the property. Where, owing to unusual and specific conditions, a literal enforcement of any of the provisions of this section would result in unnecessary hardship, such reasonable exceptions thereto may be made by the Township Supervisors as will not be contrary to the interests of the public or property owner involved or adjacent thereto, in which

case the issuance of a permit or erection of a building or other structure may be permitted subject to such conditions and safeguards as may be imposed to assure adequate streets and other public improvements, and adequate conservation and other on-site improvements.

§ 115-4. Jurisdiction.

The Board shall have jurisdiction and control of all subdivision and land development within township limits. To ensure that the actions of the Board in administering this chapter may be correlated with all relevant data and procedures, the Board hereby designates the Township Planning Commission as the agency of the Board for the following purposes:

A. All applications relating to either preliminary or final approval of subdivision and land development plans shall be referred, upon submission, to the Township Planning Commission.

B. All preliminary consultations by the developer relating to the plans shall be held with the Township Planning Commission.

C. The Township Planning Commission shall make recommendations to the Board concerning approval, disapproval, modification and conditions of approval of all plans. In making such recommendation, the Commission shall refer specifically to that section of this chapter or any statute or other ordinance or regulation applicable to the recommendation.

D. The Planning Commission shall make recommendations to the Board concerning the interpretation of and the granting of modifications from the provisions and standards required by this chapter.

ARTICLE II
Terminology

§ 115-5. Word usage.

Unless otherwise expressly stated, the following words and phrases shall be construed throughout this chapter to have the meanings herein indicated. The singular shall include the plural and the plural shall include the singular. Words used in the present or past tenses shall include the future tense. The words "person," "applicant," "subdivider" and "owner" shall include a corporation, unincorporated association and a partnership, or other legal entity, as well as an individual. The word "building" shall include the word "structure." The word "watercourse" shall include channel, creek, ditch, dry run, spring, stream and river. The words "shall" and "will" are always mandatory.

§ 115-6. Definitions.

As used in this chapter, except where the context clearly indicates otherwise, the following words and/or phrases have the meaning indicated below:

* * *

(2) In the event that the township and the applicant cannot agree on the amount of review fees which are reasonable and necessary, then the applicant and the township shall follow the procedure for dispute resolution set forth in Section 510(g) of the Municipalities Planning Code.[10]

(3) The applicant must promptly pay all review fee billings. Any fee billing not disputed by the

[10] **Editor's Note: See 53 P.S. § 10501(g).**

applicant within 10 days of receipt will be deemed accepted by the applicant. Failure of the applicant to pay undisputed billings within 30 days shall give the Board the authority to suspend the applicant's application until all such billings are fully paid. If at the time when the application is considered by the Board for approval there exists a billing unpaid by the applicant for a period of time in excess of 30 days from the billing date, failure of the applicant to pay the billed review fees shall be a basis for the denial of the application. [Added 6-7-1994 by Ord. No. 1994-2]

§ 115-13. Restrictions.

A. A building permit may be issued only upon approval of a preliminary plan or, in those instances where a preliminary plan is not required, approval of a final plan. In no instance may such a permit be issued until water and sewage facility permits have been issued by the authority responsible for water and sewage.

B. No lot in a subdivision may be sold unless a final plan has been approved and recorded.

§ 115-14. Exception.

Where, owing to special conditions, a literal enforcement of this chapter and/or its accompanying regulations would result in unnecessary hardship, the Board of Supervisors may make such reasonable exception thereto as will not be contrary to the public interest and will be in conformance with existing community development. In no case shall the amount of escrow and bonding be reduced from that specified elsewhere herein. A public hearing shall be conducted prior to the granting of any exception.

ARTICLE V
Procedures

§ 115-15. General requirements.

A. All preliminary and final subdivision of land development plans shall be reviewed by the Township Planning Commission and the County Planning Commission and shall be approved or disapproved by the Board in accordance with the procedures specified in this article and in other sections of this chapter. Any application not processed as required hereafter shall be null and void unless it was made prior to the adoption of these regulations.

B. All subdivision applications shall be, for the purposes of procedure, classified as either minor or major, as follows:

(1) Minor subdivision. One in which no road, public or private, is to be constructed or widened; no other improvements, including but not limited to walkways, curbs, gutters, street lights, fire hydrants, sanitary sewers, storm drainage facilities or water mains, requiring a performance bond or escrow are to be constructed; and no earthmoving activities, except those incidental to construction of a single-family dwelling on each proposed lot, will take place. No more than two minor subdivisions shall be approved over any period of time for any original tract or parcel of ground. When more than two minor subdivisions have been submitted and approved for any original parcel, each succeeding subdivision shall be submitted as a major subdivision.

(2) Major subdivision. Comprises all other subdivision and all land developments not involving subdivision.

§ 115-16. Plan submission.

Landowners submitting an application for a minor subdivision may elect to submit such an application in the form of a final plan, in which event the procedures set forth in § 115-18 and § 115-20 hereof shall not be applicable. Nothing herein contained, however, shall prevent such landowner from first submitting a sketch plan and/or a preliminary plan, for a minor subdivision, and such is encouraged. Minor and major subdivision applications shall be subject to all review procedures specified herein. All submissions must be accompanied by fees established by resolution from time to time by the Board of Supervisors. Each plan must provide for an affidavit of ownership which must be notarized on the top sheet of each plan. No reviewing agency may review the plan without the plan being stamped, initialed and dated by the Township Subdivision Coordinator, who is appointed annually by the Board of Supervisors.

§ 115-17. Submission to other agencies.

Plans showing revision levels, dates of revision and revised items shall be submitted to the following agencies by the township for review during the course of the township review process:

A. Chester County Planning Commission. One copy of preliminary and final plans shall be submitted to the Chester County Planning Commission for its review and comment.

B. Chester County Health Department. One copy of the preliminary and final plans shall be submitted to the Chester County Health Department for review of matters relating to adequacy of the site to sustain on-site water and/or sewage disposal systems.

C. Chester County Conservation District. One copy of preliminary and final plans shall be submitted to the Chester County Conservation District for review of all elements relating to drainage and abatement of soil erosion, provided that the Township Engineer does not make such a review.

D. The township will be responsible for submitting plans to the designated agencies within such time after submission to the township as township shall determine.

§ 115-18. Submission of sketch plan.

A. A sketch plan for all proposed subdivisions or development of land located within the township may, at the developer's option, be submitted to the Township Planning Commission for review, provided that all necessary fees are submitted.

B. Such sketch plan shall be considered as submitted for informal discussion only between the developer and the Planning Commission. Submission of a sketch plan does not constitute submission of an application for approval of a subdivision or land development plan. The submission of a sketch plan shall not preclude the developer from proceeding with preliminary and final plan application as required in this chapter prior to the approval of a sketch plan by the Board.

C. For informational purposes, four copies of the sketch plan shall be submitted to the Township Secretary, for distribution to the Township Engineer and the Planning Commission.

§ 115-19. Review of sketch plan.

The Township Planning Commission shall review the sketch plan and shall recommend such changes and modifications as it shall deem necessary or advisable in the public interest in accord with the Municipalities Planning Code.[11] Within 10 calendar days after such scheduled meeting review, the Secretary of the Planning Commission shall send written notice of the action of the Planning Commission to the following:

A. The Board of Supervisors.

B. The applicant.

§ 115-20. Submission of preliminary plan.

A. The preliminary plan shall conform to the most recent administrative regulations adopted by the Board of Supervisors for such purpose.

B. Copies of the preliminary plan and all required supplementary data shall be initially and officially submitted to the Secretary of the township. After the required fees have been properly paid, the Secretary shall transmit such plans to the Township Board of Supervisors, the Township Planning Commission, the Township Solicitor, the Township Parks and Recreation Commission, the Township Historic Commission, the County Planning Commission, the Township Engineer, Chester County Soil Conservation District (CCSD), Chester County Health Department and such other persons or agencies as the Board of Supervisors shall determine. **[Added 12-6-1994 by Ord. No. 1994-8]**

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[11] **Editor's Note: See 53 P.S. § 10101 et seq.**

C. Official submission of a preliminary plan to the Township Secretary shall comprise:

(1) Three copies of the Application for Review of Preliminary Subdivision or Land Development Plan.

(2) Two copies of appropriate planning module for land development.

(3) Twenty copies of the preliminary plan. **[Amended 12-6-1994 by Ord. No. 1994-8]**

(4) Twenty copies of all other required information and plans, including the conservation plan. **[Amended 12-6-1994 by Ord. No. 1994-8]**

D. Upon receipt of the above, the Township Secretary shall retain one complete submission for the Secretary's records, and shall forward one complete submission each to the reviewing commissions and agencies designated in Subsection B hereof.

§ 115-21. Review of preliminary plan.

A. Township Planning Commission.

(1) The Township Planning Commission shall, within 45 days, review the plan and the recommendations of the County Planning Commission and the Township Engineer.

(2) Within 10 days after such meeting, the Secretary of the Planning Commission shall send written notice of the action of the Planning Commission and the reasons therefor to the following:

(a) The Township Supervisors.

(b) The applicant.

B. Township Engineer. The review by the Township Engineer shall include an examination of the content of the plans to be certain that all information

required by this article is presented in the plan submitted, and the accompanying documentation and investigation of the plan to be certain that all other township ordinances and regulations are complied with and an examination of the engineering feasibility and the reasonableness of the various schemes presented for the location, alignment and grade of streets, stormwater drainage, sanitary sewers, water supply, surface water drainage facilities and easements related thereto. The Township Engineer shall confer with the developer to the extent necessary to obtain conformity of the plan with these regulations and to comment upon the matter subject to his review. The Township Engineer shall forward his comments on the plan to the Planning Commission within 10 days, along with a recommended level of escrow/bond funds to be provided by the subdivider.

C. Board of Supervisors.

(1) When a written report of a preliminary plan has been officially submitted to the Board of Supervisors by the Planning Commission, such plan shall be placed on its agenda for review and hearing.

(2) The Board of Supervisors shall review the preliminary plan and the written reports of the Township Planning Commission, the Township Engineer and the County Planning Commission and shall require or recommend such changes and modifications as it shall deem necessary or advisable in the public interest, or it may deny approval. The Board shall act upon all applications for subdivision within 90 days from the date of the next public meeting of the Planning Commission after submission by the applicant, other than the informal sketch plan. The Board shall communicate its decision, in writing, to the

applicant within 15 days of the making of such decision, and will specify the amount of escrow/ bond to be provided.

(3) The Board of Supervisors shall designate a copy of the preliminary plan as the official copy. This copy shall include all necessary corrections as required by the Board of Supervisors. It shall be retained in the township files.

§ 115-22. Submission of final plan.

A. Within 30 days after approval of the preliminary plan, a final plan and all necessary supplementary data shall be officially submitted to the Township Secretary. However, an extension of time may be granted at the option of the Board of Supervisors.

B. The final plan shall conform to the most recent administrative regulations adopted by the Board of Supervisors for such purposes.

C. The Board of Supervisors may permit submission of the final plan in sections, each covering a reasonable portion of the entire proposed development as shown on the approved preliminary plan.

D. Official submission of the final plan to the Board of Supervisors shall consist of:

(1) Three copies of the application for review of final subdivision and/or plan.

(2) Three prints of street cross-section drawings, including street profiles and finished grades.

(3) **[Amended 12-6-1994 by Ord. No. 1994-8]** Twenty prints of the final plan, including lot lines with metes and bounds showing location of permanent markers as designated below:

(a) Six black-on-white prints.

(b) One reproducible Mylar.

(c) Other prints or reproducibles as may be required.

E. The subdivider shall agree, in writing, in a form provided by the township, that he will lay out and improve roads, streets or alleys and construct all of the improvements, including necessary grading of the entire street and alley right-of-way, paving, curbs, gutters and other improvements, including sidewalks, sewers, trees, street name signs, monuments, crosswalks, fire hydrants and all other related improvements and facilities which may be required as a condition of the approval of the plan by the Board of Supervisors within the time or times therein specified.

F. The subdivider shall furnish a bond or escrow in such amount, and not less than 110% or the maximum permissible by law, of cost of improvements. Under such conditions, and in form with surety, as shall be approved by the Board of Supervisors, to guarantee the performance of the subdivider's undertaking in Subsection E above and to secure the completion of the said improvements. Such security shall be renewable annually. Upon acceptance of the said street or improvements, the subdivider shall provide a maintenance bond not exceeding 15% of the full cost of improvements under such conditions, in form and with surety as shall be approved by the Board of Supervisors to guarantee the maintenance of the streets or alleys, including grading, paving, curbs, gutters, sidewalks, street lights, street signs, sewers and crosswalks for a period of not less than 18 months by the township. In lieu of bond, the subdivider may deposit cash or securities with the township or with a bank or trust company to guarantee performance of said contract and to secure completion

of the improvements under an escrow agreement approved by the Township Solicitor and the Board of Supervisors. The escrow agent for the deposits of such cash or securities shall be designated and selected by the Board of Supervisors.[12]

G. The subdivider shall install all underground utilities before paving any streets and before sidewalks are constructed. If streets are required to be opened for construction, a permit is required, and the street restored to original street specification is a requirement.

H. The Township Secretary shall first ensure that all fees have been paid and the necessary performance bonds have been received. The Township Secretary shall then forward all final plan documentation to the Planning Commission except one copy of the application and one print of the final plan.

I. The Secretary of the township shall forward to the County Planning Commission one print of the final plan and one copy of the application for final review.

§ 115-23. Review of final plan.

A. Township Engineer. The review of the Township Engineer shall include an examination of the content of the plans to be certain that all information and data required by this article and by the Planning Commission and Board in their review of the preliminary plan are presented in the final plan as submitted. The Township Engineer shall forward his comments on the plan to the Planning Commission within 10 days.

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[12] Editor's Note: Amended at time of adoption of Code (see Ch. I, General Provisions, Art. I).

B. Township Planning Commission.

(1) The Planning Commission shall review the plan at a scheduled meeting following its receipt.

(2) Within 45 days after such meeting, the Secretary of the Planning Commission shall send written notice of the action of the Planning Commission to the following:

(a) The Board of Supervisors.

(b) The Applicant.

C. Board of Supervisors.

(1) When a written report on a final plan has been officially returned to the Board of Supervisors by the Planning Commission, such plan shall be placed on the agenda of the Board of Supervisors for review and hearing.

(2) The Board of Supervisors shall review the final plan and the written reports of the Township and County Planning Commissions and Township Engineer and shall require or recommend such changes and modifications as it shall deem necessary or advisable in the public interest.

(3) The Board of Supervisors shall approve, modify or reject the final plan within 90 days of its filing from the date of the next public meeting of the Planning Commission, and shall notify, in writing, the applicant and any persons or groups of persons requesting such notice of decision within five days of the making of its decision.

(4) The Board of Supervisors shall designate one print and one Mylar of the final plan as the official copy. This copy shall include all corrections required by the Board of Supervisors. It shall be retained in the township files.

(5) Copies of the final plan as finally approved, with the appropriate endorsement of the Board of Supervisors and the Township Engineer, shall be distributed as follows:

(a) Three prints to the subdivider.

(6) At-time-of-signing procedure.

(a) Status of report sheet for subdivision completed.

(b) Agreement for appropriate escrow funds between developer and Township Solicitor.

(c) Township must pass resolution approving subdivision.

(d) Original signatures on two Mylars and eight copies of:

[1] The Board of Supervisors.

[2] The Chairman of Planning Commission.

[3] The Township Engineer.

§ 115-24. Recording of final plan.

A. After completion of these procedures, all endorsements, including the endorsement of the Township Engineer, shall be indicated on the record plan and on as many other copies of the final plan as may be desired.

B. The record plan shall be a clear and legible reproducible tracing on linen or dimensionally stable film.

C. After endorsement by the township, the developer shall file the record plan with the County Recorder of Deeds within 30 days of the date of final approval by the township. If the developer fails to record the final plan within such period, the action of the township shall be null and void, unless an extension of time is

granted, in writing, by the township upon written request by the developer. If the plan is approved by the township with

* * *

B. In making any alterations, the following shall be observed:

(1) No lot or tract of land shall be created that is smaller than the minimum dimensions required by Chapter 155, Zoning.

(2) Easements reserved for drainage shall not be changed.

(3) No lot shall be created which does not abut a street.

(4) The character of the area shall be maintained.

(5) The above shall not restrict a property owner from purchasing additional contiguous land, provided that it is recorded on the plan that a buildable lot is not intended.

C. In every case, the applicant shall file an application with fee and prepare a record plan and submit said plan for the endorsements of the Township Engineer and the Board of Supervisors identifying the previous record plan and shall record the revised plan.

§ 115-27. Dedication documents.

A. Prior to the dedication of road rights-of-way, sewer easements and open spaces, the developer shall submit the following documents to the Township Secretary:

(1) One reproducible tracing and two prints of the plan with all changes "as-built" incorporated on the drawing.

(2) Two prints of all road profiles, utility and conservation plans with all changes "as-built" incorporated on the drawings.

(3) One copy of the deed of dedication.

(4) One copy of the maintenance bond for a period of two years.

(5) One copy of a certificate of search or title company report to satisfy the Township Solicitor that no liens exist against the property, for taxes or otherwise.

(6) One copy of any deed restrictions or protective covenants as may be imposed or recorded upon the property as a condition of sale.

B. Processing. The Township Engineer shall review the "as-built" plan, the deed of dedication and maintenance bond, and shall make recommendation to the Supervisors.

ARTICLE VI
Plan Submission Requirements

§ 115-28. Sketch plan.

When a sketch plan is submitted in accordance with § 115-18, it shall contain the following data:

A. Tract boundaries, accurately labeled.

B. A location map showing where the development is located.

C. The name of the township, county and state.

D. North point.

E. Written or graphic scales.

F. Significant topographical (five-foot) contour intervals and physical features; stream and floodplain location.

G. Existing and proposed general street and lot layout.

H. The date and name of the developer and subdivision.

I. In the case of a land development plan, the proposed location of all buildings, parking compounds and other planned features.

J. The proposed method of water supply and sewage disposal.

K. Soil types.

L. Zoning applicable to the tract.

M. Stormwater and erosion control measures to be taken to prevent damage to adjacent and downstream properties.

§ 115-29. Preliminary plan. [Amended 12-6-1994 by Ord. No. 1994-8]

A. The preliminary plan of a proposed development shall be clearly and legibly drawn to a scale of not less than one inch equals 100 feet. One copy of the plan shall be filed which shall be reduced to a scale of one inch equals 400 feet. The preliminary plan shall contain all of the information required in this subsection upon penalty of being refused for filing.

B. The original drawing, and all submitted prints thereof, shall be made on sheets no larger than 30 inches by 42 inches. If the preliminary plan requires more than one sheet, a key diagram showing relative location of the several sections shall be drawn on each sheet.

C. The preliminary plan shall show:

(1) The name or any other identifying title of the proposed subdivision and of the township, county and state.

(2) The North point, graphic scale, written scale and date, including the month, day and year that the original drawing was completed, the month, day and year that the original drawing was revised, for each revision, and a clear and concise description and location of the changes made in each revision.

(3) The name of the record owner (and developer).

(4) The name and address of the registered engineer, surveyor or land planner responsible for the plan.

(5) The names of the owners of all adjacent properties and the deed book and page number where recorded.

(6) A key map, for the purpose of locating the property being subdivided, drawn at a scale of not less than one inch equals 2,000 feet and showing the relation of the property, differentiated by tone or pattern, to adjoining property and to all streets, roads, municipal boundaries, and to recorded subdivision plans existing within 1,000 feet of any part of the property.

(7) Tract boundaries of the property being developed, showing bearings and distances, and a statement of total acreage of the property.

(8) The names and locations of all existing sewer lines, water lines, fire hydrants, utility transmission lines, culverts, bridges, railroads, easements, rights-of-way and other significant manmade features within the proposed subdivision and within 50 feet from the boundaries of the proposed subdivision.

(9) All existing buildings and other structures.

(10) All existing streets, including streets of record (recorded, but not constructed), on or abutting the tract, including names, right-of-way widths, cartway (pavement) widths and approximate grades.

(11) Site analysis plan. The site analysis plan provides the basis for determining maximum allowed gross density per the requirements of Chapter 155, Zoning, § 155-12. The plan may be submitted on a single sheet if all required information can be clearly shown. For projects that are too complex or too large for the required information to be clearly shown on a single sheet, additional sheets may be required. The plan shall be subject to the approval of the Township Engineer and shall include the following information:

(a) Slope information clearly identifying all areas of moderate slope and steep slope and calculating the square footage of each such area. Areas of moderate slope and steep slope shall be identified on the plan through shading or similar technique that clearly identifies and distinguishes between these two slope categories.

[1] Slope analysis shall include contour lines at vertical intervals of not more than two feet.

[2] Slope shall be measured as the vertical distance (rise) divided by the horizontal distance (run). Slope shall be determined through the use of aerial photographic interpretation or actual field survey. The USGS topographic quadrangle maps shall not be recognized as an acceptable source of information for

this determination. Location and elevation of the datum used shall be a known established bench mark.

(b) Soil types and their boundaries. For any tract that contains hydric soils, a full wetlands analysis [as described in Subsection C(11)(c), below] shall be required.

(c) Wetland analysis. When required [per Subsection C(11)(b), above], a full wetland analysis shall be submitted to include:

[1] A delineation and area measurement of all lakes and ponds.

[2] A full wetland report conducted by a qualified wetland biologist or others of demonstrated qualifications. Such a person shall certify that the methods used correctly reflect technical concepts currently used and accepted by the U.S. Army Corps of Engineers, including identification and analysis of wetland vegetation, hydric soils and/or hydrologic indicators. The wetland report shall include a determination of whether wetlands are present on-site and a full delineation, area measurement (in square feet) and description of any wetlands determined to be present. The wetland definition and analysis methodology accepted by the U.S. Army Corps of Engineers shall be used. The study must be approved by the Board of Supervisors on the recommendation of the Township Engineer.

(d) Floodplain limits (based on § 155-43C in Chapter 155, Zoning) and a calculation of the square footage of floodplain area.

(e) Natural watercourses, ponds and swales.

(f) The limits of all woodlands and significant trees shall be identified. Woodland areas and significant trees that will be disturbed shall be identified. The percentage of woodland areas that will be disturbed shall be identified. Significant trees proposed to be removed shall be identified and the percentage of the total number of significant trees on the site that will be removed shall be indicated.

(g) Areas of moderate slope proposed to be disturbed shall be identified. The percentage of the entire portion of the tract containing moderate slope represented by this disturbance shall be indicated.

(h) Calculation used to determine permitted gross density per Chapter 155, Zoning, § 155-111, for any tract containing any protected areas (as defined in § 115-6). Such calculation shall include:

[1] Total areas of all existing and proposed road rights-of-way and utility rights-of-way.

[2] Calculation of base site area (as defined in § 115-6).

[3] Protected area calculation. Indicate the area of each category of protected area that occurs on the site and the total area of all protected areas for the site.

[4] Indicate the percentage of the base site area represented by the total protected area.

[5] Indicate the appropriate development factor based on the sliding scale table in Chapter 155, Zoning, § 155-111B.

[6] Indicate the maximum allowable density by showing the calculation required per Chapter 155, Zoning, § 155-111C.

(i) All documented and/or known historic or archaeological resources.

* * *

(6) A grading plan shall be included showing all proposed alterations of the natural grade, whether by cut or by fill, exceeding two feet, together with reasons for such alterations. Amounts of cut and fill shall be identified. Existing site contours and final site contours shall be shown. To assure that all fill material used contains no hazardous materials, sources and types of materials used for fills shall be identified. To assure that excavated material is disposed of properly, the location of any off-site deposit of excess material shall be identified.

(7) Preliminary designs are required for any bridges or culverts which may be necessary. Such designs shall meet all applicable requirements of the Department of Environmental Resources and/or the Pennsylvania Department of Transportation and shall be subject to the approval of the Township Engineer.

§ 115-30. Final plan.

A. The final plan of a proposed subdivision shall be clearly and legibly drawn to a scale of not less than one inch equals 100 feet.

B. The original drawing, and all submitted prints thereof, shall be made on sheets not larger than 30 inches by 42 inches. If the final plan requires more than one sheet, a key diagram showing the relative location of the several sections shall be drawn on each sheet.

C. The final plan shall include:

(1) The name or any other identifying title of the proposed subdivision and of the township, county and state.

(2) North point, graphic scale, written scale and date, including the month, day and year that the original drawing of the final plan was completed, the month, day and year that the original drawing was revised, for each revision, and a clear and concise description and location of the changes made in each revision.

(3) The name of the record owner (and developer) of the tract, and the source(s) of title to the land being developed, as shown by the records of the County Recorder of Deeds.

(4) The name, address, license number and seal of the registered professional engineer or surveyor responsible for the plan.

(5) The names of all abutting subdivisions, if any, with book and page numbers, where recorded, and the names of the owners of all adjacent unplotted land, if any, and the book and page number where recorded.

(6) A key map, for the purpose of locating the property being subdivided, drawn at a scale of not less than one inch equals 2,000 feet and showing the relation of the property, differentiated by tone or pattern, to adjoining property and to all streets, roads, municipal boundaries and

recorded subdivision plans existing within 1,000 feet of any part of the property. In addition, the approximate distance to the nearest street shall be shown, and a title, scale and North point shall be indicated.

(7) The total tract boundary lines of the area being developed with accurate distances to hundredths of a foot and bearings to ¼ of a minute. These boundaries shall be balanced and closed with an error of closure not to exceed one foot in 10,000 feet; provided, however, that the boundary(ies) adjoining additional unplotted land of the subdivider (for example, between separately submitted final plan sections) are not required to be based upon field survey, and may be calculated. The monuments shall be indicated, along with a statement of the total area of the property being developed. In addition, the Engineer or surveyor shall certify to the accuracy of the survey, the drawn plan and the placement of the monuments.

(8) The name (or number) and cartway width and lines of all existing public streets and the name and location of all other roads within the property.

(9) The following data for the cartway edges (curblines) and right-of-way lines of all recorded (except those which are to be vacated) and/or proposed streets, and for the right-of-way lines of all existing streets, within the property:

(a) The length (in feet and hundredths of a foot), of all straight lines and of the radius and the arc (or chord) of all curved lines (including curved lot lines); and

(b) The width (in feet) of the cartway, right-of-way and of the ultimate right-of-way, and (in

degrees, minutes and quarters of a minute) of the delta angle of all curved lines, including curved lot lines.

(10) All straight lot lines and chords and radii of curved lot lines, defined (in feet and hundredths of a foot) by distances, and (in degrees, minutes and quarters of a minute) either by magnetic bearings or by angles of deflection from other lot and street lines.

(11) Lot numbers and a statement of the total number of lots (and parcels).

(12) A statement of the intended use of all nonresidential lots. A statement of restrictions of any type which exist or will exist as covenants in the deed(s) for all lots contained wholly or in part in the development and, if covenants are recorded, including the deed book and page number.

(13) The proposed building reserve (setback) line for each lot, or the proposed placement of each building and, where applicable, location of on-site sewage and water facilities.

(14) The location of all existing and proposed monuments.

(15) All easement or rights-of-way where provided for or owned by public services or any other party who has secured them and any limitations on such easement or rights-of-way. Rights-of-way shall be shown and accurately identified on the plan, and easements shall either be shown or specifically described on the plan. Utility easements should be located in cooperation with the appropriate public utility companies.

(16) Location, size and invert elevation of all sanitary and storm sewers and location of all manholes,

inlets and culverts (these data may be submitted as a separate plan).

(17) If the development proposes a new street intersection with a state legislative route, the Pennsylvania Department of Transportation intersection permit number(s) shall be indicated for all such intersections.

(18) A certification of ownership, acknowledgment of plan and offer to dedicate shall be lettered on the plan and shall be duly acknowledged and signed by the owner(s) of the property and notarized.

(19) A certificate requesting approval of the plan by the Township Supervisors, Township Engineer and by the Township Planning Commission shall be presented.

(20) A reasonable space shall be left along the lower edge of the sheet, in order that the Recorder of Deeds may acknowledge receipt and recording of the plan when it is presented.

D. The final plan shall be accompanied by the following supplementary data:

(1) Typical street cross-section drawing(s) for all proposed streets. Cross-section drawings may be shown either on the final plan or on the profile sheets.

(2) Profile sheets for all proposed streets within the tract.

(a) Such profiles shall show at least the following information, properly labeled:

[1] Existing (natural) profile along both the center line of each street and at each right-of-way line.

[2] Proposed finished grade of the center line, or proposed finished grade at the top of both curbs, or proposed finished grade at both cartway (pavement) edges.

[3] The length of all vertical curves.

[4] Existing and proposed sanitary sewer mains and manholes.

[5] Existing and proposed storm sewer facilities and drainage improvements.

(b) The profile sheets shall be legibly drawn at one of the following sets of scales:

[1] One inch equals 40 feet horizontal, and one inch equals four feet vertical; or

[2] One inch equals 50 feet horizontal, and one inch equals five feet vertical.

(3) All offers of dedication, and covenants governing the reservation and maintenance of undedicated open space, shall bear the certificate of approval of the Township Solicitor as to their legal sufficiency.

(4) Such private deed restrictions, including building setback lines, as may be imposed upon the property as a condition to sale, together with a statement of any restrictions previously imposed which may affect the title to the land being developed.

(5) Documentation of approval of the Chester County Department of Emergency Services. **[Amended 12-6-1994 by Ord. No. 1994-8]**

§ 115-31. As-built plan.[14]

The as-built plan and profile sheet shall be drawn at the same scale as the final plan and profile sheets certified to by the developer of record and approved by the Township Engineer. The as-built plan shall be filed along with the offer to dedicate the roads of the development or applicable phase thereof. The same shall indicate the actual location, dimensions and/or elevations of all completed improvements, including but not limited to:

A. Concrete monuments and iron pins.

B. Cartway edges or top of curbs for both sides of each street.

C. Sanitary sewer main, manholes and laterals.

D. Storm sewers, mains, manholes, inlets, culverts, impoundment basins, ponds, water retention and let-down systems.

E. Water lines and fire hydrants.

F. Street lights, where applicable.

G. Electrical and all other underground utilities.

H. Permanent sedimentation control structures or basins.

I. Landscaping and planting material.

J. All easements.

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[14] Editor's Note: Section 603, Conservation Plan, which immediately preceded this section, was deleted 12-6-1994 by Ord. No. 1994-8.

ARTICLE VII
Agreements

§ 115-32. Agreement specifications.

Every application for final approval shall be accompanied by a form of agreement to be approved by the Township Solicitor before it shall be executed by the Board of Supervisors and filed of record. The agreement shall specify the following, where applicable:

A. That the owner agrees that he will lay out and construct all roads, streets, lanes or alleys, together with all other improvements, including grading, paving, curbs, gutters, sidewalks, street lights, fire hydrants, water mains, street signs, shade trees, storm and sanitary sewers, landscaping, traffic control devices, open space and restriction areas, erosion and sediment control measures in accordance with the final plan as approved, where any or all of these improvements are required as conditions of approval, and that he shall complete these improvements within the time or times specified by the Board of Supervisors.

B. That the owner guarantees completion of all improvements ready for dedication to the township within 24 months of final plan approval or such other time as specified by the Board of Supervisors by means of a bond or deposit of funds or securities in escrow in the

* * *

EXHIBIT 9

Ordinance 1993-8 – Automatic Protection Devices

Mr. Wilson presented for consideration an ordinance with the following caption:

ORDINANCE 1993-8

AN ORDINANCE DESCRIBING AUTOMATIC PROTECTION DEVICES PERMITTED IN THORNBURY TOWNSHIP, CHESTER COUNTY, PENNSYLVANIA, AND RESTRICTING THEIR USE.

Mr. Adams explained that the ordinance had been done in conjunction with Westtown and East Goshen Townships to make the standards the same for all three townships to ease the police in their enforcement. Mr. MacDonnell moved and Mrs. Gowen seconded a motion to adopt the ordinance as presented. The motion was carried unanimously.

Announcement

Mr. Wilson announced that the special meeting called for December 9th concerning the re-zoning of the Penn Oaks Country Club had been cancelled. The Township Secretary is to reset the date after consulting with all parties.

Commons of Thornbury – Final Plan Signing

The final plans for the shopping center at the Commons of Thornbury was presented to the Board for signature. Mrs. Gowen moved and Mr. MacDonnell seconded a motion that the plans are not to be released until all conditions are met and outstanding fees are paid. The

Board granted the applicant's request for a 60-day extension in which to met the conditions. The motion was carried unanimously.

The meeting was adjourned at 8:55 P.M.

Respectfully submitted,

Judith S. Mankin
Township Secretary

/jsm

Announcement

Mrs. Gowen announced that the Board of Supervisors would be having a public meeting on July 19, 1994 to consider the adoption of an ordinance required in conjunction with the loan from the Delaware Valley Regional Funding Authority ("DVRFA") for the Township's road improvement plans. Mr. Adams has reviewed the paperwork and sent his letter of approval to the DVRFA.

(Mr. Wilson arrived at 7:45 P.M.)

Commons of Thornbury – Recordation Extension Request

A letter was reviewed from William Schwartz, the attorney for Commons of Thornbury, in which he requested an additional 60-day extension of time to have the final plans recorded and asked that the conditions of approval be amended for the shared driveway with Robert Eichman. After discussing both matters with Mr. Eichman and Mr. Adams, Mr. Lang moved and Mrs. Gowen seconded a motion to grant a 60-day extension in which to

have the plans recorded. The motion included the notation that the Township expected the applicant to comply with all original conditions of approval, including the paving of the complete driveway, and that the Board expected the applicant to apply the binder course to the driveway within the three week period specified in Mr. Schwartz' letter dated July 5, 1994. The motion was carried unanimously. A letter is to be sent to Mr. Schwartz and the applicant, with a copy to Mr. Eichman, notifying them of the Board's decision.

Resolution 1994-6 – Open Space Grant Application

Mr. Tom Comitta presented the final draft of the Township's Open Space Grant Application for funds from Chester County. The application included a resolution by the Board of Supervisors stating their approval of the application. After thoroughly discussing the application, Mrs. Gowen moved and Mr. Schmidt seconded a motion to approve the resolution as presented by Mr. Comitta. The motion was carried unanimously.

Letters of support from the Township's Planning and Park & Recreation Commissions will be attached to the application. Mr. Comitta will prepare a concept plan to be submitted with the application. It was decided that no Township Building would be planned for this location. It is just to be used as parkland and recreation areas.

[LOGO]

THORNBURY TOWNSHIP
P.O. BOX 30
WESTTOWN, PA 19395

MINUTES OF
BOARD OF SUPERVISORS MEETING

JANUARY 17, 1995

The Special meeting of the Thornbury Township, Chester County Board of Supervisors was called to order at 7:30 P.M. by Vice Chairman, J. Christopher Lang, at the Township Building at 754 Cheyney-Thornton Road, Cheyney, PA.

Present: J. Christopher Lang, Vice Chairman
Robert MacDonnell, Supervisor
William S. Schmidt, Supervisor
John Hall, Township Solicitor
Albert Giannantonio, Township Engineer
David Linahan, Township Engineer
Mahlon Rossiter, Township Manager
Judith S. Mankin, Township Secretary

Introduction of New Township Engineer

Mr. Lang introduced Albert Giannantonio and David Linahan who will be representing the new Township Engineering firm of Yerkes Associates, Inc. Mr. Giannantonio gave a brief synopsis of his firm and how it will interact with Thornbury Township.

Police Report

Lt. John Dumond, of the Westtown-East Goshen Police Department, gave the Police Report for the month of

December. He noted that it had been a light month for activity for Thornbury with the exception of a shooting that had occurred in Birmingham Township with the victim ending up in Thornbury. Lt. Dumond noted that WEGO is in the process of interviewing for part-time officers to fill in when the full-time officers are absent.

Mr. Lang asked Lt. Dumond to submit a report showing total coverage of Thornbury for 1994 and for the total WEGO coverage in 1994. Lt. Dumond said he would do so.

Commons of Thornbury

Mr. Ray Acciavatti met with the Board of Supervisors to update them on the status of his development. He noted that DER has granted final approval of the on-site system and he is in the process of lining up tenants for the shopping center. He expects to record the final plans within a few weeks and hopes to break ground in March or April of this year. The tenants are hoping to be in business in time for the 1995 holiday season.

Thornbury Properties – Act 537 Plan

Mr. Lang reported that the Township had received a letter from Thornbury Properties' attorney, Mary Ann Rossi, granting an extension of time for the Board of Supervisors' decision on their Act 537 Plan submittal. The new date is set for February 7, 1995.

Mr. Hall reported that he and Mr. Adams had had a telephone conference with Mrs. Rossi who stated that the required Phase I Archeological Study had just been completed and would be forwarded directly to the Township. He reported that the applicant has been advised of the

Planning Commission and Township Engineer's concerns with regard to the submittal. Mrs. Rossi understood their concerns and will work with the Township Solicitor to prepare a draft agreement for the operation, maintenance and ownership of the sewer system in time for the February 7th meeting.

Upon questioning from the Board, Mr. Hall noted that the Phase I Study evaluation had been done by the PA Historical and Museum Commission and Township input is minimal. The Township Engineer can determine for the Township if the Study is complete. Mr. Linahan noted that the final determination of whether the application is complete is done by the Board of Supervisors who then determines when the 60-day review clock starts. He noted that, up to this point, the applicant has apparently been determining the 60-day clock. As the Department of Environmental Resources ("DER") stated in its meeting with Mr. Hall and him this morning, "The 60-day time clock will start when all of the Township's questions have been answered satisfactorily."

Mr. Linahan noted that the Planning Commission and the Board of Supervisors can ask questions about the historical aspect of the submittal. He also felt the completed application should then be made available for the 30-day review period, not the 30-day period that the applicant has already conducted. Mr. Giannantonio noted that both the Township's Historical Preservation Commission and Mr. Stevenson, of the Planning Commission, might wish to review the completed document and submit comments to the Board. Mr. Lang noted that the Board might wish to consider having a professional consultant review the document if the questions and comments are extensive.

A letter will be sent to the applicant stating the Township's position regarding the 60-day time clock and the items missing from the Act 537 submittal.

Greens of Penn Oaks – Act 537 Plan Review

Mr. Ray Iacobucci, applicant for the subdivision/land development of the Penn Oaks Country Club, and his attorney, Fronefield Crawford, met with the Board to discuss the status of the project. Mr. Iacobucci stated that he felt the Township should be moving this matter along "as all the major issues had been decided during the zoning hearing."

Mr. Lang noted that the Township Engineer would make the determination as to whether the Act 537 plan was complete so the 60-day clock could start. He also noted that the landscaping plan does not match the engineering plans, he requested a drawing of the six-unit building and also noted that the architectural plans do not match the site plan and grading shown.

Mrs. Iacovelli questioned whether the single family unit should be included in the subdivision/land development plans for the Country Club as the Planning Commission had been under the impression that the Board had asked the applicant not to include it. Mr. Crawford stated that the single family unit will be made a separation subdivision/land development application which could run concurrently with the townhouse application.

Mr. Crawford noted that he would be willing to work with the Township to develop an agreement between the Township and the applicant for the Act 537 plan and to who would be permittee or co-permittee. He also noted

that the 70 townhouses would be on a community system which would be designed so that the clubhouse could be added in the future if necessary. Public water will be investigated for the clubhouse and the single family unit.

Mr. Linahan stated that he had reviewed the plan very quickly and his major concern was that the Township was not listed as permittee or co-permittee. He concurs with DER that the Township should be involved in the project, even though the applicant does not want to have the Township listed. He had recommendations as to the style and long term operation of the system and would discuss the matter with the applicant's engineer. One suggestion was for a sand infiltration system which would eliminate all but one seepage bed. The drain fields will be under the ownership of the Penn Oaks Country Club and this should be set out in the agreement.

Open Space Purchase

Mr. Giannantonio reported that he had reviewed the Township's proposed plan for the Jones tract and also the Jones' suggestion that access to the property be from S. Westbourne Road. Mr. Giannantonio noted that the proposed road and bridge would cross over 400 feet of flood plan and wetlands. The area accepts drainage for 10,250 acres above Route 926. Any bridge built would have to exceed the bridge currently over 926. He estimated the cost to be in excess of $300,000 plus another $25-30,000 for engineering and application fee to DER.

Mr. Giannantonio felt the best access would be from 926 through the Post Office/Market area. He will investigate the possibility of amending PennDOT's permit for the entranceway.

Mrs. Dewey reported that the Park & Recreation Commission had recommended that the tract be purchased for passive open space not for active use as proposed by the Supervisors.

Solicitor's Permit Application

An application to sell furniture door-to-door was reviewed and discussed. The matter was turned over the Township Solicitor for opinion to the Zoning Officer.

Public Comment

Mr. Mortenson and Mr. Ball, from Thornbury Estates, were in attendance to ask the Board for assistance in having the Festers clean up their property, including the junk yard and double parking of vehicles in the right-of-way. It was noted that the Township's Zoning Officer had sent them a letter of violation but they had refused to accept it. It was agreed that the Zoning Officer should contact the Westtown-East Goshen Police for escort so the notice could be delivered personally.

Act 537 Submission Discussion

Mr. Linahan distributed copies of Chester County Procedures for Components 2, 3 and 4 for Act 537 Plan amendment. The breakdown showed the process by which the application would progress to DER. Upon submittal to the Township, it is forwarded to the Chester County Planning Commission and Health Departments, Township Planning Commission and Township Engineer for review and comments. The County agencies would have 60 days to comment. After all questions are answered to the

Township's satisfaction, the complete component would be held for 30 days' public review. If not complete, it would be returned to the applicant. Following review and municipal approval, the required resolution and transmittal letter would be sent to CCHD for forwarding to DER. Der has 60 days for review of residential developments during which time it may raise questions. If the application does not address the long-term operation of the system, DER will reject it.

Mr. Linahan noted that a final agreement is not necessary for approval by the Township, just an outline of what is proposed. The Township can require a signed agreement before signing off on the application.

He noted that DER requests that the municipalities serve as either permittee or co-permittee of the applications. If violations occur, DER would consider the Township as permittee anyway.

The Township Engineer and Solicitor will meet to draft an outline of what the Township should be expecting in any agreement to amend the Act 537 plan for the Township. They will also work on developing agreements for the two Act 537 plans currently before the Township.

Mr. Linahan also noted that the Act 537 plan submitted for Thornbury Properties' PRD was done haphazardly. It shows 50 foot setbacks for the spray fields when DER normally requires 200 feet. He also questioned the adequacy of the proposed 20-day storage pond. DER is more concerned about setbacks across existing property rather than new owners. He felt Thornbury Properties should be notified that until an agreement is signed, the application will not be considered complete by the Township. Approval

will not be given until complete and 30-day public review has taken place.

Bill Approval

Mr. Schmidt moved and Mr. MacDonnell moved to approve payment of the list of bills presented. The motion was carried unanimously.

The meeting was adjourned at 10:30 P.M.

Respectfully submitted,

Judith S. Mankin
Township Secretary

/jsm

[LOGO]

THORNBURY TOWNSHIP

P.O. BOX 30
WESTTOWN, PA 19395

MINUTES OF
BOARD OF SUPERVISORS MEETING

FEBRUARY 7, 1995

The regular monthly meeting of the Thornbury Township, Chester County Board of Supervisors was called to order at 7:30 P.M. by Chairman Charles A. W. Wilson at the Township Building at 758 Cheyney-Thornton Road, Cheyney, PA.

Present: Charles A. W. Wilson, Chairman
J. Christopher Lang, Vice Chairman
Paula Gowen, Supervisor
William Schmidt, Supervisor
Mahlon Rossiter, Township Manager
Judith S. Mankin, Township Secretary

Minute Approval – Minutes of December 6 and 20, 1994 and January 3 and 17, 1995

Mr. Schmidt moved and Mr. Lang seconded a motion to approve the minutes of the meetings of December 6 and 20, 1994 and January 3 and 17, 1995 as presented. The motion was carried unanimously.

Commons of Thornbury – Extension Request

Mr. Richard Acciavatti was in attendance to request that the Board of Supervisors release the final approved plans for the Commons of Thornbury so he could have them recorded in order to start leasing the project. Mr. Giannantonio's letter dated February 7, 1995 outlining his suggested requirements for establishing a security bond for the improvements of the project, was reviewed and discussed by the Board. Mr. Acciavatti felt the request was too stringent but noted he would comply. He stated that his attorney would be in contact with the Township Solicitor and Engineer to settle the matter.

Mrs. Gowen moved and Mr. Schmidt seconded a motion to grant a further extension of time until March 10, 1995 for Mr. Acciavatti to comply with the conditions of approval so the plans can be released for recordation. The motion was carried unanimously.

EXHIBIT 10

[LOGO]
GENUARDI'S
FAMILY MARKETS

December 5, 1997

[EXECUTED LETTER 12/5/97]

Mr. John G. Acciavatti, President
Noble Enterprises, Inc.
PO Box 179
Westtown, PA 19395-00179

Dear John:

We have reviewed your revised proposal of November 17 and have made the changes that you notated and are marked with an asterisk:

I. Site: The Commons at Thornbury, Thornbury Township, Chester County, PA.

II. Lessor: Thornbury Noble, Ltd.

III. Lessee: Genuardi Super Markets, Inc.

IV. Store Size: Approximately 50,000 [55,000] square feet

*V. Use: Sale of food, food products, pharmacy, other general merchandise and other services, or any other lawful use.

*VI. Primary Term: Twenty (20) years

*VII. Options: One (1) 5-year and one (1) 4-year. Should Lessor desire more options and should those additional options trigger a PA taxable event, then Lessor shall be solely responsible for such tax.

VIII. CAM, Taxes, Insurance: Tenant to pay a pro-rata share of CAM, real estate taxes and insurance.

IX. Exclusive: Lessor shall provide an exclusive use covenant for Lessee's use as a food store; however,

Lessor shall not be required to grant an exclusive use for the sale of prescription drugs or banking services.

X. Rent Commencement Date: Rent shall commence the earlier of:

a) 120 days after Substantial Completion of (i) Lessor's construction work and (ii) Lessee's leasehold improvements, or

b) the first day the Lessee is open for business to the public.

Lessee shall, during the aforesaid 120-day period, fixture and merchandize the store. During this time, Lessee shall be responsible for all utilities and security.

XI. Lessor's Work: Lessor shall construct a "turnkey" facility in accordance with plans and specifications generated by the Lessee. For the purpose of this proposal, it is assumed that Lessee's facility will have a total cost to the Lessor of $65 PSF. Lessee shall prepare, at its sole expense, all architectural, engineering, and construction documents for its store. Lessor shall obtain all permits and approvals at its sole expense. Lessor shall, at its sole expense, construct the balance of the shopping center and complete all required site work and be responsible for coordination of Lessee's architectural plans with its work.

*XII.

Base Rent	Annually	Monthly	Per Sq Ft
Years 1-5	725,000	60,416.67	14.50
Years 6-10	750,000	62,500.00	15.00
Years 11-15	800,000	66,666.66	16.00
Years 16-20	875,000	72,916.67	17.50
1st Option	950,000	79,166.67	19.00
2nd Option	1,025,000	85,416.67	20.50

XIII. Operating Covenant: Lessee shall open for business in fulfillment of the Use clause. Thereafter, Lessee shall have the right to cease operations at any time. In that event, Lessor shall be provided with a right to recapture the premises.

XIV. Assignment/Sublease: Lessee shall have the right to assign or sublet all or part of the demised premises for any lawful business use with Lessor's consent, which will not be unreasonably withheld; or any license or sublease that is integral to Lessee's business without Lessor's consent.

XV. Site Plan: It is agreed that Lessee and Lessor will attempt a zoning and plan change to locate the building at the Berdich property line within twelve (12) months during which time the legal/ engineering expenses will be shared equally between Lessee and Lessor not to exceed $50,000.00 by either party. In the event that this plan is not approved, Lessee will proceed with the building located approximately 200' west of the Berdich line.

XVI. Parking: Lessor will provide a minimum of five (5) parking spaces per thousand square feet of leaseable area for the entire shopping center.

XVII. Pylon Sign: As part of Lessor's work, a pylon sign shall be constructed for the shopping center. Lessee shall have the right to occupy the pylon sign along with other tenants of the shopping center. Positioning on the pylon shall be in order of the size of their premises, and each occupant's sign shall be in proportion to the size of their premises. Lessee shall pay the cost of its sign panel only.

XVIII. Facade and Sign Package: Lessee's facade shall be provided by Lessee as part of its plans and specification documents and will be in accordance with its prototype building. Lessee's building

signage shall conform with the Township ordinance and shall be furnished and installed by Lessee.

XIV [sic]. Commission: The parties will warrant to each other that no real estate commission is due to any broker as a result of this transaction.

This letter represents a non-binding proposal for the leasing of the premises herein described. No contract shall exist until a formal lease is executed and delivered by both parties. The submission of these proposed terms for consideration does not constitute a reservation of space or an option to lease the premises and the parties hereto may discontinue moving forward with the lease at any time, whereupon they shall have no rights against the other.

If you are in agreement with the above terms, please sign below and return one copy of this letter to me.

Sincerely,

/s/ Richard Dugan
Richard Dugan
Director of Real Estate

RD:dc

APPROVED: /s/ John G. Acciavatti DATE: 12/5/97
John G. Acciavatti, President

EXHIBIT 11

THORNBURY TOWNSHIP, CHESTER COUNTY BOARD OF SUPERVISORS MEETING DECEMBER 16, 1997

In attendance were Supervisors Charles A. Wilson (Chairman), Christopher Lang (Vice Chairman), Patricia Dewey and Robert MacDonnell; Robert Adams (Solicitor), Ronald Miller, Robert Eichman and John Stevenson (Planning Commission PC), D.J. Tindall and Helene MacLaughlin (Park & Recreation) and Mahlon Rossiter (Township Manager).

Mr. Wilson led the Pledge of Allegiance and called the meeting to order at 7:35 P.M.

Police Report

Chief Dumond reported that calls for November in the township were extremely low. The Chief extended an invitation to attend the police luncheon on 12/19/97 at the Westtown Township Building.

Minutes

A motion was made seconded (RM/PD) and carried to approve the December 2, 1997 minutes.

Township Park Plans

Thomas Comitta displayed the park plans. Since last viewed in May there have been many major updates through 11/18/97. The Project Manual is not complete because the Prevailing Minimum Wage expired. Mr. Comitta is waiting a new rate from L&1. The hexagonal

pavilion originally proposed has been changed. A custom designed pavilion will be built. Mr. Lang and Mr. Stevenson have been asked to do a technical review of the new pavilion. Mr. Comitta cited the following time table: (1) The plans go to the County 12/22/97 (2) Advertise for bid 1/05/98 (3) Pre-bid conference 1/21/98 at 1:00 P.M. at the Post Office (4) Bid opening 2/03/98 (5) Select a contractor by 3/04/98 (6) Target completion on 9/25/98. The grant expires 12/21/98. There was discussion on the location of the pavilion, the turtle mound and the play apparatus. Mr. Lang recommended improvements to the bridge. As suggested by Mr. Stevenson, the Board asked Mr. Comitta to give a copy of the park site plan to Louis Termini to help the restaurant and park plans coincide.

Commons at Thornbury (CT)

Present were Richard Acciavatti (Owner), Ken Kynett (Attorney) and Skip Genuardi (Developer) to determine the feasibility of building a supermarket at Route 202 and Route 926.

Mr. Kynett displayed a "concept" plan of the site showing the existing structures and proposed supermarket. Mr. Acciavatti commented that the existing open foundations will be filled in, the appearance along Route 202 will be redone and there is public water. Mr. Kynett noted that the vacant home, east of the property and owned by Mr. Acciavatti is zoned residential. CT is asking to rezone the parcel to commercial to provide better for traffic circulation. CT is looking for reaction and input from the Supervisors. The market would be between 50/55,000 s.f. Mr. MacDonnell expressed concern on expanding the commercial zoning. Mr. MacDonell recommended keeping the

market on the current commercial property. Mr. Adams asked Mr. Acciavatti if any additional stores are proposed on the south side. Before the Board considers any zoning relief the township wants to see the build-out. Mr. Adams questioned if Mr. Acciavatti is preserving the area to the south for future use. Mr. Lang told Mr. Acciavatti that everything has to be put on the table now. CT noted that good circulation through the site is important for the success of the project. Mr. Adams asked the applicant to create a plan on what has been discussed demonstrating realistic assumptions. Mr. Lang requested an aerial photograph reflecting the properties surrounding TC. Mr. Wilson recommended that the applicant tie into public sewer. Mr. Lang noted the residents of Thornbury Estates would be able to connect if a lateral main was constructed. Mr. Miller asked at what point is the PC going to be involved with this plan. Mr. MacDonnell responded that the Supervisors control the zoning in the township and the rezoning issue must be decided before going forward to the PC.

Act 537 Revision

Mr. Wilson reported that Mrs. Dewey, Mr. Rossiter and David Linahan of Yerkes Associates (YA) met with Department of Environmental Protection (DEP) on 12/15/97. Jay Stack and Del Shelton of K. Hovnanian (HOV) and Mary Ann Rossi, Esq. were also present at the meeting. HOV's project can be completed and the spray fields can be deferred. DEP was cooperative and positive. The plant can be completed with 100% stream discharge while an alternative discharge method is evaluated. Mr. Linahan will research drip irrigation. At the DEP meeting, Mrs. Rossi stated that HOV paid to design the current system and

any expense incurred to redesign it should be at the township's cost. Mr. Lang responded that HOV may benefit by not installing the spray fields and the township should look to them to pay for their fair share. Mr. Linahan will do analysis and has no idea at this stage on the cost of a drip system. Mr. Miller asked if HOV has checked into a "rapid infiltration basin.

Emergency Operations Plan (EOP)

Mr. Eichman stated that for first time in 6 or 7 years the township will be in compliance with the County, State and Federal government regarding an EOP. Mr. Wilson suggested a training meeting for the individuals named in the EOP to review manual procedures. Mr. Eichman reported that he reviewed Cheyney University's (CU) Emergency Manual and they did an excellent job. Mr. Rossiter informed the Board that there will be a meeting in mid January with Carl Williams of (CU) regarding their plan. Mr. Rossiter told the Supervisors that CU has the facilities for mass care and good coordination with CU will make the township's job easier. Mr. Lang requested Mrs. Dulin to summarize the EOP for the Board.

1998 Budget – Mr. Stevenson asked if the PC was going to receive funds to do a Comprehensive Plan. Mr. Rossiter replied the money has been budgeted for the study. Mr. Wilson recommended an early year joint meeting with the PC and Supervisors. Mr. Wilson stated there are variables that could happen during 1998 and the budget might have to be amended. A motion was made, seconded (CL/RM) and carried to adopt the 1998 budget by approving Resolution 1997-12 with a mil rate of .76.

West Chester United Soccer Club (WCUSC)

The township received a site plan from Dan Kennedy, President of WCUSC. Mr. Miller thought that a representative from WCUSC should attend the township meetings during the review process. Mrs. Dewey recommended that WCUSC connect to public water if feasible. If WCUSC's only use for water is the concession stand, okay. If WCUSC plans to water the playing fields that is another issue. Mrs. Dewey stated the plan before the Board is not delineated. The wetlands and floodplain lines cannot be defined. Mr. Lang questioned the need for such a large storage building (50" X 24). The Board asked Mr. Wilson and Mrs. Dewey to meet Mr. Dan Kennedy and review the plan. Mr. Lang will forward his comments prior to the meeting. Mr. Miller stated that the PC has not been given the opportunity to comment on the plan. The PC has concern that the building must be at least 100' from the wetland area and that WCUSC tie into public water. Mr. Wilson advised that any improvements to the site requires a review and permits from DEP.

Planning Commission

Mr. Miller reported on the PC's meeting held December 10, 1997. The following plans were reviewed: (1) Exxon Land Development Plan (2) Percy Neall 3-lot Final Subdivision (3) Robert Gleichert 3-lot Preliminary Subdivision. Mr. Miller recommended that Mr. Gleichert should be put in touch with Bill Mineo at the Chester County Park & Recreation to determine if there is an interest on the County's part to acquire the property as parkland. Mr. Miller commented that the PC also addressed their list of goals for 1998 and plan to have special work sessions. Mr.

Miller asked if he could meet in Executive Session with the Board at the conclusion of the public meeting.

Discussion took place on the need for a basic understanding between the Chester County Health Department (CCHD) and township. Mr. Rossiter stated that the township needs an ordinance to support CCHD's disapproval. Mr. Wilson suggested the township talk to CCHD.

Park & Recreation Commission (P&R)

Mrs. Tindall told the Board that P&R recommend naming the park "Goose Creek Park". The Conmiission set goals for 1998; i.e., preservation of historic areas, open space, trails, etc. P&R has rejected any "bow and arrow" activity in the park. Mrs. Tindall announced that the Tree Lighting Festival at the park on December 13th was a huge success. Mrs Tindall commended the P&R members for an outstanding job. The Board thanked Mrs. Tindall, Mrs. Dewey and the P&R members for their work. Mrs. Tindall stated many other activities are being planned for the park. A motion was made, seconded (RM/PD) and carried to table naming the park at this time. Mr. Lang was asked to talk with the Historic Commission and ask for their input before naming the park.

Engineer Contract 1998

Mr. Rossiter reported that the contract for next year is approximately 3% to 4% higher. After some discussion it was agreed to table any action until the reorganization meeting.

Bill List Approval

Mr. Wilson asked the Board to approve a payment to James Gillespie in the amount of $1700. This item was not included in the Bill List. It is partial payment for the documentation of the barn. HOV will reimburse the township $800. Mr. Gillespie has 80% of the work completed. Mr. Lang asked that Mr. Gillespie submit a disk to the township demonstrating exactly what has been done before payment. A motion was made, seconded (RM/PD) and carried to approve the Bill List.

Announcements

Reorganization – will be held Monday, January 5, 1998 at 7:30 P.M. The regular meeting of the Board will follow.

Codification – Notice of the adoption of the Code has been advertised as required by law.

Thornbury Commercial Center

A motion was made, seconded (CL/PD) and carried to execute the commercial lease (former Headlights Salon) for Joya Gift Shop subject to review of the changes as discussed by the Board and the Solicitor's opinion.

Dallett Environmental Assessment

Mr. Rossiter informed the Board that Satterthwaite Associates estimated the cost for the work between $35,000/$40,000. The Dallett family is waiting for the township's issue list. Mr. Lang told the Supervisors that he wanted another opinion regarding Satterthwaite's conclusion. A motion was made, seconded (RM/PD) and carried

that Mr. Lang contact another environmental specialist for a second opinion.

Other

Mr. Wilson asked the Board if they wished to hold an appreciation dinner for all the people who work for and volunteer their services to the township. The Supervisors endorsed Mr. Wilson's suggestion. Mr. Wilson will try to target a date in January 1998.

Public Comment

Ben Johnson asked the Supervisors to send the Solicitor to the ZHB if Robert Gleichert requests a hearing. Mr. Johnson felt that the applicant is trying to circumvent the flag lot ordinance.

Mr. Stevenson noted that Don Stark of Urban Engineers stated that PennDOT has plans major for improvements along Route 202 within 5 years. Route 926 will cross over Route 202.

Mr. Stevenson stated that the residents in Thornbury Estates are spending between $14,000 to $22,000 upgrading and replacing septic systems. TE should be advised if there is the potential of running public water and sewer before the homeowner make these investments.

Adjournment – A motion was made (CL/PD) and carried to adjourn the meeting at 10:25 P.M. Mr. Wilson announced

that the Board was going into Executive Session with Mr. Miller.

Respectfully submitted,

Constance Dulin
Township Secretary